PB90-141029

Federal Facilities Compliance Strategy

(U.S.) Environmental Protection Agency, Washington, DC

Nov 88

U.S. Department of Commerce
National Technical Information Service
NTIS

United States
Environmental Protection
Agency

External Affairs
(A-104)

EPA/130/4-89/003
November 1988

EPA

Federal Facilities Compliance Strategy

PB90-141029

REPRODUCED BY
U.S. DEPARTMENT OF COMMERCE
NATIONAL TECHNICAL INFORMATION SERVICE
SPRINGFIELD, VA. 22161

BIBLIOGRAPHIC INFORMATION

PB90-141029

Report Nos: EPA/130/4-89/003

Title: Federal Facilities Compliance Strategy.

Date: Nov 88

Performing Organization: Environmental Protection Agency, Washington, DC. Office of Federal Activities.

NTIS Field/Group Codes: 68*, 70F

Price: PC A15/MF A02

Availability: Available from the National Technical Information Service, Springfield, VA. 22161

Number of Pages: 328p*

Keywords: Management, Government policies, *Federal agencies, Environmental legislation, Compliance, Enforcement, US EPA, Pollution control.

Abstract: The U.S. Environmental Protection Agency (EPA) believes that Federal agencies have an inherent obligation to comply with all Federal environmental statutes in the same manner and degree as all other regulated entities. To help achieve this goal, EPA has developed a new Federal Facilities Compliance Strategy which establishes a comprehensive and proactive approach to achieving compliance at Federal facilities. The document provides the basic framework and consistent guidelines for all EPA media programs (e.g., air, water, hazardous waste, etc.) to follow in their compliance and enforcement activities at Federal facilities. It also attempts to reconcile EPA's dual responsibilities to provide technical assistance and advice to Federal facilities pursuant to Executive Order No. 12088, and the statutory authorities to take enforcement actions for violations at Federal facilities in appropriate circumstances.

EPA

Federal Facilities Compliance Strategy

Office of Federal Activities
U.S. Environmental Protection Agency

November 1988

i.a

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 8 1988

THE ADMINISTRATOR

The U.S. Environmental Protection Agency (EPA) believes that Federal agencies have an inherent obligation to comply with all Federal environmental statutes in the same manner and degree as all other regulated entities. It is imperative that every effort be made to ensure that Federal facilities achieve and maintain high rates of compliance with all environmental requirements. And it is important to EPA's compliance and enforcement efforts at non-Federal entities that facilities of the Federal government demonstrate that they have their "own house in order." In order to demonstrate EPA's commitment in this important area, we have established a new goal for our Federal Facilities Compliance Program which states that EPA shall help "ensure that Federal agencies achieve compliance rates in each media program which meet or exceed those of major industrial and major municipal facilities."

To help achieve this goal, EPA has developed a new Federal Facilities Compliance Strategy which establishes a comprehensive and proactive approach to achieving compliance at Federal facilities. This document, also known as the "Yellow Book", provides the basic framework and consistent guidelines for all EPA media programs (e.g., air, water, hazardous waste, etc.) to follow in their compliance and enforcement activities at Federal facilities. It also attempts to reconcile EPA's dual responsibilities to provide technical assistance and advice to Federal facilities pursuant to Executive Order No. 12088, and our statutory authorities to take enforcement actions for violations at Federal facilities in appropriate circumstances.

Recently-authorized environmental statutes have included special requirements and additional provisions which are specific to Federal facilities. These provisions clarify that Federal agencies must comply with environmental laws in the same manner and degree as all other facilities subject to such requirements. EPA intends to utilize the full range of its available enforcement authorities to ensure compliance by Federal facilities. However, EPA also recognizes that there are some limitations and differences in the types of enforcement actions which EPA can take at Federal facilities. These special circumstances have made it clear that if EPA is to be truly effective in ensuring high compliance rates at Federal facilities, a separate strategy such as this is needed to address this unique subset of facilities which we regulate.

Thorough and consistent implementation of this Strategy should significantly strengthen EPA's compliance and enforcement program for Federal facilities. We will apply the same timeframes for taking enforcement action at Federal facilities as EPA does for other facilities. We also have established a formal dispute resolution process with strict time periods for escalation when Compliance Agreements or Consent Orders cannot be expeditiously negotiated between EPA Regional offices and Federal facilities.

This Strategy also emphasizes the use of innovative compliance management techniques (e.g., environmental auditing), selected initiatives for improved compliance tracking of Federal facilities and more effective use of the Federal Agency A-106 Pollution Abatement

Planning Process. In addition, since many of EPA's programs are delegated to the States, we have devoted a separate chapter in this document to the critical role of States in responding to compliance problems at Federal facilities.

In closing, I would like to reiterate that EPA is very serious in its efforts to ensure compliance by Federal facilities, and we will take all necessary actions, including enforcement in appropriate circumstances, to improve the environmental status of facilities of the Federal government. Federal facilities have done much to increase the effectiveness of their environmental management programs, but further progress is needed if Federal facilities are to meet their obligations to comply to the fullest extent possible with all of the environmental laws. We at EPA believe that this is an attainable goal and look forward to working together with affected parties in implementing this strategy and demonstrating that Federal facilities can truly be the model for compliance which we feel they are capable of becoming.

Nov. 3, 1988
Date

Lee M. Thomas
Administrator

FEDERAL FACILITIES COMPLIANCE STRATEGY

TABLE OF CONTENTS

Page Number

INDEX OF EXHIBITS vi

LIST OF ACRONYMS AND ABBREVIATIONS vii

LIST OF APPENDICES ix

EXECUTIVE SUMMARY x

CHAPTER I. - INTRODUCTION

A. PURPOSE OF THE STRATEGY I-2

B. OVERVIEW OF THE STRATEGY I-3

CHAPTER II. - SUMMARY OF RELEVANT ENVIRONMENTAL STATUTES AND EXECUTIVE ORDERS

A. FEDERAL FACILITY COMPLIANCE WITH STATE AND LOCAL POLLUTION CONTROL STATUTES II-1

B. FEDERAL ENVIRONMENTAL STATUTES II-1

- B.1 Clean Air Act II-2
- B.2 Clean Water Act. II-2
- B.3 Resource Conservation and Recovery Act II-4
- B.4 Federal Insecticide, Fungicide, and Rodenticide Act II-5
- B.5 Toxic Substances Control Act. II-6
- B.6 Comprehensive Environmental Response, Compensation, and Liability Act II-6
- B.7 Safe Drinking Water Act II-7

C. EXECUTIVE ORDERS II-8

- C.1 Executive Order 12088 - Federal Compliance with Pollution Control Standards II-8
- C.2 Executive Order 12146 - Management of Federal Legal Resources II-9
- C.3 Executive Order 12580 - Superfund Implementation. II-9

Page
Number

CHAPTER III. - IDENTIFICATION OF THE REGULATED COMMUNITY

A. DEFINITION OF A FEDERAL FACILITY. III-1

B. STRATEGY FOR IDENTIFYING AND TRACKING THE UNIVERSE OF FEDERAL FACILITIES III-1

B.1 Identifying the Types of Federal Facilities in the Regulated Community III-2
B.2 Improved Use of Available Information and Existing Data Systems. III-2
B.3 Special Initiatives III-4

CHAPTER IV. - COMPLIANCE PROMOTION, TECHNICAL ASSISTANCE AND TRAINING

A. COMPLIANCE PROMOTION IV-1

A.1 Information Transfer IV-1
A.2 Identifying Compliance Patterns of Federal Agencies. IV-2
A.3 Environmental Auditing IV-3

B. TECHNICAL ASSISTANCE AND TRAINING. IV-5

B.1 Technical Assistance. IV-5
B.2 EPA "Hotline" Assistance IV-6
B.3 Federal Facilities Compliance Program Assistance and Oversight. IV-7
B.4 Training Opportunities for Federal Facilities Compliance Personnel. IV-7

CHAPTER V. - COMPLIANCE MONITORING

A. OBJECTIVES OF COMPLIANCE MONITORING ACTIVITIES. V-1

B. SOURCE SELF-MONITORING, REPORTING AND RECORDKEEPING REQUIREMENTS. V-2

C. INSPECTION STRATEGY FOR FEDERAL FACILITIES V-3

C.1 Annual Inspection Planning. V-4
C.2 Regional Reporting of Inspection and Enforcement Activities at Federal Facilities V-4

Page Number

C.3 Identification of Environmentally Significant Federal Facilities for Multi-Media Inspections. V-4

C.4 Coordination with States on Federal Facilities Inspections. V-5

C.4.a Annual Meeting with States on Federal Facilities Compliance V-5
C.4.b State Reporting on Federal Facility Compliance Status. V-5

D. ACCESS TO FACILITIES REQUIRING SECURITY CLEARANCES. V-6

E. SUBMISSION AND REVIEW OF FEDERAL AGENCY A-106 POLLUTION ABATEMENT PLANS AND PROJECTS. V-6

E.1 Identification of Priority Projects V-7

E.1.a A-106 Compliance Classes. V-7
E.1.b Targeting Resources to Address Priority Areas. V-8

E.2 A-106 Process Overview and Time Table V-8
E.3 State Participation in the A-106 Process V-10

CHAPTER VI. - ENFORCEMENT RESPONSE TO COMPLIANCE PROBLEMS AND VIOLATIONS OF ENVIRONMENTAL LAWS AT FEDERAL FACILITIES

A. OVERALL COMPLIANCE POLICY AND PHILOSOPHY VI-2

B. EPA RESPONSE TO FEDERAL FACILITIES VIOLATIONS VI-3

B.1 Federal Facilities Compliance Process: Civil Administrative Enforcement Procedures. VI-4

B.1.a Notification of Violation VI-4
B.1.b Response by Federal Facilities: Certification of Compliance or Remedial Action Plans. VI-5
B.1.c Initial Negotiation of Compliance Agreements or Consent Orders VI-6
B.1.d Issuance of Proposed Consent Orders or Proposed Compliance Agreements VI-8
B.1.e Internal EPA Dispute Resolution Procedures VI-9
B.1.f Federal Facilities Dispute Resolution Process. VI-10

Page Number

B.1.g Use of Executive Order 12088 - Federal Compliance with Pollution Control Standards. VI-11
B.1.h Use of E.O. 12146-Resolution of Interagency Use of Legal Disputes. VI-12
B.1.i Use of Other Dispute Resolution Procedures for Violations of Signed Agreements or Consent Orders. VI-11
B.1.j Impact of Funds Availability on Achieving Compliance and Negotiating Compliance Schedules. VI-12
B.1.k Exemptions VI-13

B.2 Enforcement Actions for Violations at Federal Facilities Directed at Non-Federal Parties VI-14

B.2.a Limitation on Civil Judicial Enforcement Actions Applies Only to Executive Branch Agencies VI-14
B.2.b Contractor and Other Private Party Arrangements Involving Federal Facilities. VI-14
B.2.c Contractor Listing. VI-16

B.3 Criminal Enforcement Actions at Federal Facilities VI-16
B.4 Press Releases for EPA Enforcement Actions at Federal Facilities VI-16
B.5 Monitoring Compliance VI-17

CHAPTER VII. - ROLE OF THE STATES IN RESPONDING TO FEDERAL FACILITIES VIOLATIONS

A. STATE RESPONSE TO FEDERAL FACILITIES VIOLATIONS VII-1

A.1 Use of State Enforcement Authorities VII-1
A.2 State Enforcement Response Lead Following EPA Inspection in Delegated States. VII-2
A.3 EPA Involvement in State Enforcement Actions VII-2
A.4 Relationship of State Administrative and Judicial Citizen Suits to EPA Compliance Agreements. VII-3

B. FEDERAL FACILITIES IN THE STATE/EPA ENFORCEMENT AGREEMENTS PROCESS. VII-3

Page Number

B.1 Clear Oversight Criteria and Oversight Approach. VII-4
  B.1.a Identification of and Priorities for the Regulated Community. VII-4
  B.1.b Clear and Enforceable Requirements VII-4
  B.1.c Accurate and Reliable Compliance Monitoring VII-4
  B.1.d High or Improving Rates of Continuing Compliance. VII-4
  B.1.e Timely and Appropriate Enforcement Response VII-5
  B.1.f Accurate Recordkeeping and Reporting VII-5
B.2 Direct EPA Enforcement VII-5
B.3 Advance Notification and Consultation. VII-5

CHAPTER VIII.- EPA ROLES AND RESPONSIBILITIES FOR PROGRAM IMPLEMENTATION

A. REGIONAL OFFICE STAFF. VIII-1
  A.1 Regional Administrator VIII-1
  A.2 Regional Administrator/ Deputy Regional Administrator VIII-2
  A.3 Regional Counsel VIII-2
  A.4 Regional Program Staff/Division Directors VIII-3
  A.5 Regional Federal Facilities Coordinator. VIII-4
B. EPA HEADQUARTERS OFFICES VIII-6
  B.1 Headquarters Program Offices. VIII-7
  B.2 Office of External Affairs/Office of Federal Activities. VIII-8
  B.3 Office of Enforcement and Compliance Monitoring. VIII-10
  B.4 Office of General Counsel VIII-10

INDEX OF EXHIBITS

Exhibit — Page Number

I-1 EPA Federal Facilities Coordinators. I-5

III-1 Defining the Federal Facility Coordinators. III-6

III-2 Identification of the Regulated Community of Facilities with Federal Involvement. III-7

III-3 Federal Facilities Identification Numbers III-9

III-4 Program Information Systems III-11

IV-1 The EPA Journal. IV-9

V-1 Media Program Inspections. V-11

V-2 Annual Timetable of Key A-106 Events V-14

V-3 Federal Agency A-106 Pollution Abatement Plan-Project Report Form No. 3500-7 . . . . V-15

V-4 EPA Inadequate and Needed Sheets and the Federal Agency Response Formats. V-16

VI-1 Timely and Appropriate Enforcement Response Matrix. VI-18

VI-2 Federal Facility Enforcement Response Process and Dispute Resolution Process. VI-21

VI-3 EPA Initial Enforcement Response to Violations at Facilities with Federal Involvement. VI-23

VIII-1 EPA Regional Office Staff Coordination VIII-11

VIII-2 EPA Headquarters Office Staff Coordination VIII-12

LIST OF ACRONYMS AND ABBREVIATIONS

AA	Assistant Administrator
AO	Administrative Order
ATS	Administrator's Tracking System
CAA	Clean Air Act
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
COCO	Contractor Owned/Contractor Operated
COCO (E)	Contractor Owned/Contractor Operated (Equipment)
CWA	Clean Water Act
DOD	Department of Defense
DOJ	Department of Justice
DRA	Deputy Regional Administrator
E.O.	Executive Order
ESD	Environmental Services Division
FARES	Federal Activities Regional Evaluation System
FEMA	Federal Emergency Management Agency
FFIS	Federal Facilities Information System
FIFRA	Federal Insecticide, Fungicide, and Rodenticide Act
FINDS	Facility Index System
GAO	General Accounting Office
GOCO	Government Owned/Contractor Operated
GOGO	Government Owned/Government Operated
GOPO	Government Owned/Privately Operated
IRIS	Integrated Risk Information System
JOCO	Jointly Owned/Contractor Operated
NEIC	National Enforcement Investigations Center
NRC	Nuclear Regulatory Commission

LIST OF ACRONYMS AND ABBREVIATIONS (Continued)

NOV	Notice of Violation
OARM	Office of Administration and Resources Management
OEA	Office of External Affairs
OECM	Office of Enforcement and Compliance Monitoring
OFA	Office of Federal Activities
OGC	Office of General Council
OIRM	Office of Information and Resource Management
OMB	Office of Management and Budget
OMSE	Office of Management Systems Evaluation
OPPE	Office of Policy and Program Evaluation
ORD	Office of Research and Development
POGO	Privately Owned/Government Operated
PWSS	Public Water Supply System
RA	Regional Administrator
RAP	Remedial Action Plan
RCRA	Resource Conservation and Recovery Act
SARA	Superfund Amendments and Reauthorization Act
SDWA	Safe Drinking Water Act
SNC	Significant Noncomplier
SPMS	Strategic Planning and Management System
TSCA	Toxic Substances Control Act
UIC	Underground Injection Control

LIST OF APPENDICES

APPENDIX A Summaries of Federal Environmental Statutes:

- Clean Air Act (CAA)
- Clean Water Act (CWA)
- Resource Conservation and Recovery Act (RCRA)
- Federal Insecticide, Fungicide and Rodenticide Act (FIFRA)
- Toxic Substances Control Act (TSCA)
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)
- Safe Drinking Water Act (SDWA)

APPENDIX B Executive Orders 12088, 12146, and 12580

APPENDIX C EPA Program Definitions for Majors, Minors, Significant Noncompliers and Significant Violators

APPENDIX D EPA Environmental Auditing Policy

APPENDIX E EPA "Hotline" Assistance

APPENDIX F Reporting, Recordkeeping, and Self-Monitoring Requirements Under the CAA, CWA, CERCLA and RCRA

APPENDIX G OMB Circular No. A-106

APPENDIX H Department of Justice Letters (10/11/83 and 12/20/85) and Congressional Testimony on Federal Facilities Compliance (4/28/87)

APPENDIX I Enforcement Response Authorities by Program

APPENDIX J Sample Enforcement Response Forms and Letters

APPENDIX K Enforcement Actions under RCRA and CERCLA at Federal Facilities and Elevation Process for Achieving Federal Facility Compliance Under RCRA

APPENDIX L Policy on Publicizing Enforcement Actions

EXECUTIVE SUMMARY

The Federal Facilities Compliance Strategy establishes a comprehensive and proactive approach to achieving and maintaining high rates of compliance at Federal facilities. It provides the basic framework for EPA's media programs to follow in ensuring that Federal facilities are fully integrated into Federal and State compliance monitoring and enforcement activities. It also attempts to reconcile the Agency's dual responsibilities of providing technical assistance and advice to Federal facilities to help ensure their compliance, as required under Presidential Executive Order No. 12088, and of taking enforcement actions against Federal facilities, where appropriate, as provided for in the various environmental statutes.

This Strategy clarifies that Federal agencies must comply with environmental laws in the same manner and degree as non-Federal entities and EPA will utilize the full range of its available enforcement mechanisms to ensure compliance by Federal facilities. However, EPA also recognizes that there are certain limitations and differences in the types of enforcement actions which EPA will take at Federal facilities. In addition, EPA's mandate to provide technical assistance as well as the restrictions inherent in the Federal budget and appropriations process influenced EPA's decision that a separate strategy was needed to address compliance problems at Federal facilities.

This document was written to serve several audiences: to serve as guidance for EPA Headquarters and Regional staff; to clarify State and Federal compliance monitoring and enforcement roles; to inform Federal agencies of EPA's strategy and identify procedures to be followed when violations have been discovered; and finally, to communicate EPA's approach for addressing compliance problems at Federal facilities to Congress, the public, and concerned interest groups.

Chapter II -- Summary of Environmental Statutes and Executive Orders

Federal agencies generally must comply with all provisions of Federal environmental statutes and regulations as well as all applicable State and local requirements, with the exception of very limited Presidential exemptions which may be issued on a site-specific basis. Presidential Executive Orders also stress the mandate for Federal facilities to comply fully with environmental requirements and to establish procedures for ensuring that this is accomplished, including special procedures for resolving compliance disputes within the Executive Branch involving EPA and other Federal agencies.

Chapter III -- Identification of the Regulated Community

A more definitive inventory of Federal facilities will enable EPA to establish more effective priorities and select targets for assistance, compliance monitoring, and enforcement activities. The Strategy clarifies that EPA is focusing on that subset of Federal facilities which have potential for environmental impact.

The Strategy defines the various types of Federal facilities and Federal lands, and describes how available sources of information and program data systems will be used by EPA to identify and track compliance at Federal facilities. It outlines new actions that EPA will undertake to improve the quantity and quality of information on the Federal facilities universe, including reviews of Federal facility classifications and major/minor facility definitions and the identification of important Federal facility minors and environmentally significant facilities on a multi-media basis.

Chapter IV -- Compliance Promotion, Technical Assistance and Training

To meet its unique responsibilities under E.O. 12088 to provide technical assistance and advice to Federal agencies, EPA is establishing a more systematic communications system for exchange of information on new or revised regulatory or statutory environmental requirements. The Strategy describes the functions of EPA's various "Hotlines" and encourages Federal agency personnel to utilize these services to assist them in maintaining compliance at their facilities. In addition to information transfer, the Strategy introduces improved approaches for informing Federal facilities of available training courses. EPA will attempt to target particular agencies for courses in areas where an Agency has had a pattern of compliance problems.

EPA has a unique opportunity to work with other Federal agencies and the States to identify broad patterns of current and potential compliance problems among facilities in a given Agency. Based upon information from Regions and States about patterns of noncompliance by Federal facilities, EPA will develop a comprehensive strategy to correct these noncompliance patterns and will work with the parent Agency to ensure the strategy is implemented. In an effort to prevent future compliance problems, the annual A-106 planning process will be used more effectively to inform Federal agencies of EPA priority areas and request them to direct their A-106 projects to these areas where appropriate.

Federal facilities are also encouraged to adopt environmental auditing programs to help achieve and maintain higher levels of overall compliance. EPA will provide technical assistance to other Federal agencies in the initiation and implementation of auditing programs.

Chapter V -- Compliance Monitoring

The Strategy strengthens compliance monitoring activities at Federal facilities by ensuring that EPA or the States' presence is being demonstrated at all Federal agencies which have the potential for environmental impact. Federal facilities are to be inspected at least as frequently as all other sources, consistent with the priorities, frequencies and types of inspections established in each media program guidance. In addition, Regions are to identify the most environmentally significant Federal facilities across several media programs as candidates for multi-media inspections.

EPA plans to improve the efficiency and effectiveness of the Federal agency A-106 pollution abatement planning process by addressing compliance problems at Federal facilities before they become violations, linking the process more closely to identified EPA environmental priorities and other systematic program improvements.

Chapter VI -- EPA Enforcement Response at Federal Facilities

The most significant provisions of this Strategy deal with the basic approach and procedures EPA will use when responding to violations at Federal facilities. The strategy clarifies that Federal agencies are required to comply with environmental laws the same as non-Federal regulated entities and that EPA will utilize all of its available enforcement mechanisms at Federal facilities. The strategy also recognizes that there are certain limitations and differences in terms of the types of enforcement action which EPA will take against Federal facilities.

EPA and States are to pursue "timely and appropriate" enforcement responses to address violations at Federal facilities in a manner similar to actions taken to address violations at non-Federal facilities. EPA's enforcement responses emphasize that if a violation is not or will not be corrected within the timeframe for violations of that class, an enforcement action should be taken consistent with media program guidance.

EPA's formal enforcement responses for Federal facilities emphasize the use of mutually negotiated remedial actions and schedules in the first instance, formalized through Compliance Agreements or Consent Orders, depending upon program authorities and guidance. EPA will issue proposed administrative enforcement actions where mutual agreement cannot be reached in a timely manner, and will promptly utilize all available dispute resolution mechanisms to effectively resolve areas of disagreement. The Strategy also clarifies that Federal agency officials are required to take all available steps to obtain sufficient funds to achieve compliance on the most expeditious schedule possible.

EPA's enforcement process for Executive Branch Agencies is purely administrative, and neither provides for civil judicial action nor assessment of civil penalties.[1] This limitation does not apply to enforcement actions taken by States as authorized under various statutes nor to EPA actions directed to non-Federal operators of Federal facilities who are not officials of Executive Branch Agencies. EPA will pursue the full range of its enforcement authorities against private operators of Federal facilities (e.g., GOCOs) where appropriate and also take action against Federal agencies at GOCO facilities in certain circumstances. EPA will develop a GOCO Enforcement Strategy as a follow-up to this document to further clarify this issue.

Chapter VII -- Role of the States in Federal Facilities Compliance

States generally may exercise a broader range of authorities and enforcement tools than EPA to address violations at Federal facilities. Under many statutes, delegated or authorized States can use the full range of these enforcement authorities to address Federal facility violations to the same extent they are used for non-Federal facilities. States are also encouraged, wherever possible, to pursue bilateral, negotiated agreements or Consent Orders with Federal facilities. In any delegated State enforcement action involving Federal facilities EPA will be careful not to interfere with the State's enforcement proceedings. However, EPA will be available upon request to either party to help facilitate expeditious compliance.

State and Federal roles in compliance and enforcement are defined through State/EPA Enforcement Agreements negotiated by the Region and each of its States for each media program, consistent with the Policy Framework for State/EPA Enforcement Agreements and program-specific implementing guidance. While most aspects of these Agreements pertain equally to Federal and non-Federal facilities, the Strategy outlines several areas in which Federal facilities should be explicitly addressed in the Enforcement Agreements process.

---

[1] This limitation does not apply to penalties for violations of Interagency Agreements under Section 120 of the 1986 Superfund Amendments and Reauthorization Act (SARA).

As part of the State/EPA Enforcement Agreements process, Regions should review the Strategy with their States and address five areas: (1) the enforcement approach the State plans to use for responding to Federal facility violations; (2) the types of situations where the State would request EPA support or direct action; (3) any additional information the State has agreed to report to EPA on Federal facilities compliance and enforcement activities; (4) how the State will be involved in the A-106 process; and (5) plans for a joint EPA/State annual review of compliance problems at Federal facilities in the State.

Chapter VIII -- EPA Roles and Responsibilities for Strategy Implementation

The Strategy clarifies EPA roles and responsibilities for implementing this Strategy and the overall Federal facilities compliance program. It outlines the roles of the Regional staff and the various Headquarters offices.

The Strategy emphasizes the need for Federal facilities to be integrated into the ongoing compliance and enforcement activities of each EPA media program. The Federal facilities Coordinator's role is to coordinate Regional program office implementation of these activities. Implicit in this Strategy is the need for teamwork among the various offices and staff involved in addressing Federal facilities compliance.

****

This Strategy replaces the previous program document, entitled "Resolution of Compliance Problems at Federal Facilities" (known as the "Yellow Book"), dated January 1984, and will still be referred to as the "Yellow Book." Full implementation is being phased in over the next few years, beginning in mid-FY 1988. The enforcement response provisions are to be fully implemented immediately. EPA's Annual Operating Year Guidance will set subsequent priorities for the implementation of the remainder of this Strategy. Enforcement and remedial response procedures under CERCLA/SARA generally are not addressed by this document. However, references to CERCLA/SARA have been included in several places for informational purposes only.

In addition, the Strategy document has a number of Appendices which contain various reference documents, model response forms, compliance agreements, definitions of key EPA terms, etc., all of which should prove to be helpful to environmental staff in other Federal agencies. Additional copies of the Strategy may be obtained by written request to EPA at the following address:

U.S. Environmental Protection Agency
Office of Federal Activities (A-104)
Federal Facilities Compliance Program
401 M Street, S.W.
Washington, D.C. 20460

CHAPTER I

INTRODUCTION

I. INTRODUCTION

The EPA Administrator has stated that Federal facility compliance with pollution control regulations should be a model for the rest of the regulated community and that they should lead the way in minimizing environmental contamination. In addition, during the past few years, the issue of controlling pollution from Federal facilities has received much publicity in the news media and increased attention from Congress. Problems such as those identified in the General Accounting Office (GAO) final report on the "Status of Civilian Federal Agencies' Efforts to Address Hazardous Waste Problems on Their Land" have called increased attention to Federal facility compliance with environmental laws. Congress is continuing to include more specific legislative provisions addressing Federal facilities in environmental laws (e.g., the Hazardous and Solid Waste Amendments of 1984 and the Superfund Amendments and Reauthorization Act of 1986).

EPA has an established Federal Facilities Compliance Program to ensure that Federal facilities comply with environmental laws and regulations as required by individual Federal environmental statutes and by Executive Order (E.0.) 12088 (Appendix A). Nationally the program is administered by the Office of External Affairs/Office of Federal Activities (OEA/OFA), working in close consultation with other EPA offices, including the Office of Enforcement and Compliance Monitoring (OECM), the Office of General Counsel, and all media program offices. The program administers the Agency's responsibilities assigned under E.0. 12088, which include:

- Monitoring and ensuring that compliance is maintained at Federal facilities;
- Providing technical advice and assistance on compliance with environmental laws and regulations;
- Reviewing Federal agency pollution abatement plans; and
- Resolving disputes regarding noncompliance.

The program strategy for ensuring compliance was initially outlined in a document entitled "Resolution of Compliance Problems at Federal Facilities," dated January 1984, and commonly known as the "Yellow Book." Because of the increased public attention to Federal facilities and the issuance of new enforcement policies and guidance affecting Federal facilities, EPA has developed this revised strategy.

OFA and OECM were jointly responsible for revising the strategy with the assistance of an Agency-wide workgroup comprised of both Headquarters and Regional representatives. Key features of this revised strategy include:

- Expanding its scope to address compliance promotion techniques, compliance monitoring and tracking, technical assistance, State roles, EPA management responsibilities, and clarification of compliance resolution procedures;
- Integrating the "timely and appropriate enforcement response" concept into the compliance resolution procedures;
- Establishing a process of notification, negotiation, and formal administrative action prior to initiating the dispute resolution process;

- Clarifying the respective State, EPA, and Federal agency roles in the Federal facilities compliance process;

- Emphasizing the use of innovative approaches and management techniques to address patterns of noncompliance;

- Proposing improvements for technical assistance and training for Federal agencies; and;

- Identifying internal EPA management roles and responsibilities at Headquarters and the Regions.

A. PURPOSE OF THE STRATEGY

This Strategy establishes the basic framework for EPA programs to follow to ensure that Federal facilities are fully integrated into their compliance monitoring and assurance activities. These activities include identifying the Federal facility universe, implementing compliance promotion and technical assistance/training programs, monitoring compliance, selecting appropriate enforcement responses, resolving identified compliance problems, and establishing proper roles and responsibilities.

EPA's decision to develop a separate strategy for addressing compliance problems at Federal facilities was influenced by the following needs to:

- Clarify that Federal facilities must comply with environmental laws in the same manner and degree as non-Federal entities and that EPA will utilize its available enforcement mechanisms, whenever necessary, to ensure their compliance;

- State that it is EPA's policy that there are certain limitations and differences in the types of enforcement actions which EPA will take at Federal facilities (as compared to non-Federal facilities);

- Set forth uniform enforcement response procedures which enable EPA to make the most effective use of its available enforcement authorities at Federal facilities; and

- Develop an approach for providing appropriate levels of EPA technical assistance and oversight at Federal facilities to help them achieve and maintain high rates of compliance.

A comprehensive and consistent nationwide approach to addressing Federal facilities compliance problems is necessary to assist all Federal agencies in achieving and maintaining high levels of environmental compliance. Adherence to and consistent application of the policies and procedures articulated in this Strategy is necessary to ensure its effective implementation due to the widely-dispersed geographic nature of most Federal agency installations, facilities and lands. Effective implementation of the Strategy should assist EPA in achieving its goal of making Federal facilities a model for compliance within the regulated community.

Full implementation of this Strategy will be phased over the next few years, beginning in FY 1988. The enforcement response provisions, as described in Chapter VI, are to be implemented immediately. Aspects of the Strategy which require additional resources will be implemented as funding allows and as specified in EPA's Annual

2

Operating Year Guidance which sets annual priorities for the implementation of this Strategy. It is important to point out that EPA's various program offices also may develop follow-up media-specific guidance to ensure effective implementation of this Strategy. Such media specific guidance is encouraged as long as it adheres to and is consistent with the overall policies and procedures set forth in this EPA Strategy for addressing Federal facilities compliance problems.

B. OVERVIEW OF THE STRATEGY

This document has been written with a diverse audience in mind. First, it is intended to serve as guidance for EPA Headquarters and Regional staff in resolving Federal facility compliance problems and in providing assistance to help prevent such problems. Second, it attempts to clarify for State and Federal environmental officials what their respective roles are in the Federal facilities compliance program. Third, it informs Federal agencies of EPA's strategy for ensuring improved compliance at Federal facilities and identifies the procedures to be followed when violations have been discovered. In addition, this document may also prove useful to the public, Congress, and other parties interested in EPA's strategy for addressing compliance problems at Federal facilities.

The strategy document is divided into eight chapters covering the full range of compliance monitoring and assurance activities related to Federal facilities as follows:

- *Chapter I -- Introduction* describes the context, purpose, focus, and intended audience of the document;
- *Chapter II -- Summary of Relevant Environmental Statutes and Executive Orders* presents Federal and State statutory authorities applicable to Federal facilities;
- *Chapter III -- Identification of the Regulated Community* presents the definition of a Federal facility, distinguishes between types of facilities subject to environmental requirements, and discusses information sources for identifying the universe of facilities;
- *Chapter IV -- Compliance Promotion, Technical Assistance and Training* highlights preventive measures to noncompliance through compliance promotion activities and technical assistance and training;
- *Chapter V -- Compliance Monitoring* focuses on the major compliance monitoring requirements which Federal facilities are subject to including source self-monitoring and reporting, inspections, and the A-106 process;
- *Chapter VI -- Enforcement Response to Compliance Problems and Violations at Federal Facilities* outlines the EPA process and procedures for responding to violations identified at Federal facilities in a timely and appropriate manner;
- *Chapter VII -- Role of the States in Responding to Federal Facilities Violations* clarifies State and Federal roles and responsibilities for enforcement against Federal facilities and their coordination through the State/EPA Enforcement Agreements Process;
- *Chapter VIII -- EPA Roles and Responsibilities for Strategy Implementation* describes EPA Headquarters and Regional responsibilities for implementing the

strategy; and several appendices to the Strategy are also provided. They are included in addition to the text to provide pertinent EPA guidance memoranda, sample documents, and additional background information. In addition, Exhibit I-1 provides a listing of the EPA Federal Facilities Coordinators located in each of the EPA's ten Regional offices. These individuals serve as the primary points-of-contact for Federal agencies in EPA's Regional offices.

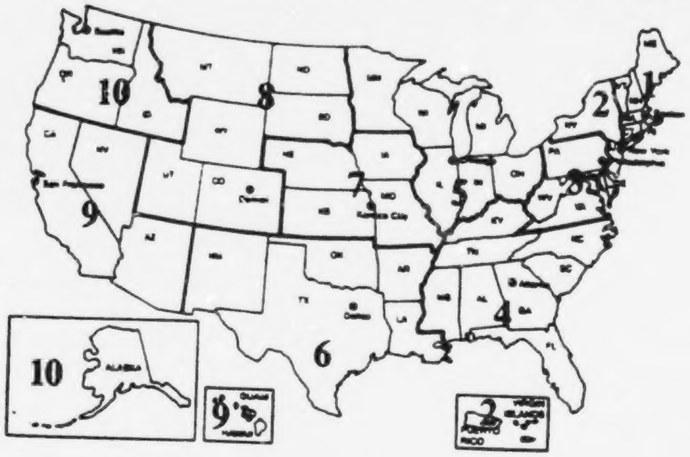
Enforcement and remedial response procedures under CERCLA/SARA generally are not addressed by this document since the program does not involve maintaining compliance at active facilities but is a cleanup program addressing inactive or abandoned sites. However, references to CERCLA/SARA have been included in several places for informational purposes only. For guidance on CERCLA, EPA's Office of Solid Waste and Emergency Response is issuing various documents on CERCLA/SARA implementation at Federal facilities.

It also is important to point out that the policies and procedures set forth herein, and internal Government procedures adopted to implement these policies, are intended as guidance to EPA and other Government employees. They do not constitute rulemaking by the Agency, and may not be relied on to create a substantive or procedural right or benefit enforceable by any other person.

4

EXHIBIT I-1

EPA Federal Facilities Coordinators



EPA Region I
JFK Federal Building
Boston, Massachusetts 02203
CML (617) 565-3395
FTS 835-3395
Connecticut, Massachusetts, Maine,
New Hampshire, Vermont,
Rhode Island

EPA Region II
26 Federal Plaza
New York, New York 10061
CML (212) 264-1840
FTS 264-1840
New Jersey, New York, Puerto Rico,
Virgin Islands

EPA Region III
841 Chestnut Building
Philadelphia, Pennsylvania 19107
CML (215) 597-1168
FTS 597-1168
Delaware, Maryland, Pennsylvania,
Virginia, West Virginia
District of Columbia

EPA Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365
CML (404) 347-3776
FTS 257-3776
Alabama, Florida, Georgia, North
Carolina, South Carolina, Kentucky,
Mississippi, Tennessee

EPA Region V
230 South Dearborn Street
Chicago, Illinois 60604
CML (312) 353-2035
FTS 353-2035
Illinois, Indiana, Michigan,
Minnesota, Ohio, Wisconsin

EPA Region VI
145 Ross Avenue
Dallas, Texas 75202-2733
CML (214) 655-2260
FTS 255-2260
Arkansas, Louisiana, New Mexico,
Texas, Oklahoma

EPA Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101
CML (913) 236-2823
FTS 757-2823
Iowa, Kansas, Missouri, Nebraska

EPA Region VIII
One Denver Place
999 18th Street
Denver, Colorado 80202-2413
CML (303) 293-1644
FTS 564-1644
Colorado, Montana, North Dakota
South Dakota, Utah, Wyoming

EPA Region IX
215 Fremont Street
San Francisco, California 94105
CML (415) 974-7539
FTS 454-7539
Arizona, California, Hawaii,
Nevada, American Samoa, Guam,
Trust Territories of the Pacific

EPA Region X
1200 Sixth Avenue, MS 443
Seattle, Washington 98101
CML (206) 442-1327
FTS 399-1327
Alaska, Idaho, Oregon, Washington

EPA Headquarters
401 M Street, S.W.
Washington, D.C. 20460
CML (202) 382-5908
FTS 382-5908

EPA/DoD Liaison Officer
401 M Street, S.W.
Washington, D.C. 20460
CML (202) 475-8799
FTS 475-8799

CHAPTER II

SUMMARY OF RELEVANT ENVIRONMENTAL STATUTES AND EXECUTIVE ORDERS

II. SUMMARY OF RELEVANT ENVIRONMENTAL STATUTES AND EXECUTIVE ORDERS

This Chapter identifies the Federal environmental statutes which are applicable to Federal facilities and focuses on those provisions which specifically address Federal facilities, including all appropriate waivers of sovereign immunity. In addition, it outlines the key Executive Orders (E.0.) which apportion responsibility for Federal agency compliance with environmental statutes.

With the exception of limited Presidential exemptions, Federal agencies generally must comply with all provisions of Federal environmental statutes and regulations as well as all applicable State and local requirements.[1] In addition, Presidential Executive Orders stress the mandate for Federal facilities to fully comply with environmental requirements and establish procedures for ensuring that this is accomplished. Executive Order 12088 states that all Executive Branch agencies are "responsible for compliance with applicable pollution control standards" which are defined in the Executive Order as "the same substantive, procedural and other requirements that would apply to a private person."

A. FEDERAL FACILITY COMPLIANCE WITH STATE AND LOCAL POLLUTION CONTROL STATUTES

Most of the Federal environmental statutes require that, in most circumstances facilities of the United States Government must comply not only with all Federal laws and regulations but also with all State and local pollution control requirements which are pursuant to Federal environmental laws.[1] It is imperative that all Federal agencies recognize their obligation to comply with State and local environmental requirements and incorporate such requirements into their environmental compliance and auditing programs. In many cases, State and local regulations are more stringent than EPA requirements and Federal facilities within those jurisdictions are generally required to comply with them. The citation for each environmental statute requiring compliance with State and local standards is included in section B of this Chapter.

E.0. 12088, described in Section C of this Chapter, also requires that Federal agencies cooperate and consult with with State and local agencies in the prevention, control, and abatement of environmental pollution. This is particularly important since EPA has delegated or approved pollution control program administration authority in qualified States for many programs. States with delegated or authorized programs have the primary responsibility for ensuring Federal facility compliance and enforcement of Federal environmental requirements as well as any additional applicable State requirements.

B. FEDERAL ENVIRONMENTAL STATUTES

Summaries of each of the major Federal environmental statutes are provided in Appendix A. This section describes any provision of these statutes which are specific to Federal agencies, and highlights State and local requirements and any special exemption provisions as set forth in the:

---

[1] Under most of the Statutes, the President may exempt a Federal facility from Federal, State and local environmental requirements if the President finds it is in the "interest of national security, or in the paramount interest of the United States."

7

- Clean Air Act (CAA)
- Clean Water Act (CWA)
- Resource Conservation and Recovery Act (RCRA)
- Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)
- Toxic Substances Control Act (TSCA)
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended by the Superfund Amendments and Reauthorization Act (SARA)
- Safe Drinking Water Act (SDWA)

The general applicability of these statutes to Federal agencies is reaffirmed by the Executive Orders that are described in Section C. It should be pointed out that while most of the environmental statutes contain limited exemption provisions, as described below, such exemptions have been rarely, if ever, granted by the President. As such, their inclusion here is not intended to imply that Federal facilities should seek these exemptions on a routine basis.

B.1 Clean Air Act

[Now codified at 42 USC 7401-7642] (First enacted July 14, 1955 at 69 Stat. 485; First major amendments were PL 91-604, December 31, 1970; Completely revised August 7, 1977; Amended: 1978, 1980, 1981, 1983).

Section 118 of the CAA (42 USC 7418) governs "Control of Pollution from Federal Facilities," and contains as broad a waiver of sovereign immunity, both substantively and procedurally, as found in any of the environmental statutes. Specifically, "[Federal facilities] shall be subject to, and comply with, all Federal, State, interstate, and local requirements ......respecting ....air pollution in the same manner, and to the same extent as any nongovernmental entity."

Section 118(b) provides for two exemptions for Federal facilities: The president may (1) exempt a Federal facility from compliance, and (2) issue regulations exempting Armed Forces weaponry, equipment, etc., "uniquely military in nature." Both exemptions are subject to the President's determination that such action is "in the paramount interest of the United States to do so." The first exemption is for one year, renewable annually; the second exemption is subject to Presidential reconsideration at three-year intervals.

Three other sections of the CAA are applicable to Federal facilities: (1) Section 176 (c) prohibits Federal agencies from engaging in, supporting, providing financial assistance for, licensing, permitting, or approving any activity which does not conform to a State Implementation Plan (SIP); (2) Section 304(a) allows for citizen suits against Federal facilities (and others); and (3) Section 306 prohibits Federal agencies from contracting with anyone convicted of violating the CAA in certain situations.

B.2 Clean Water Act

[Enacted October 18, 1972 as PL 92-500, a comprehensive revision of the Federal Water Pollution Control Act; Now codified at 33 USC 1251-1376] (Amended every year between 1973 and 1983; most recently amended February 4, 1987 by the Water Quality Control Act of 1987.)

With language almost identical to the Clean Air Act, Section 313(a) of the CWA also subjects Federal agencies to Federal, State and local water pollution controls both substantively and procedurally. Section 313(a) limits Federal facility liability to "civil penalties arising under Federal law or imposed by a State or local court to enforce an order or the process of such court." Like the Clean Air Act, the CWA also provides for Presidential exemptions for executive branch agencies.

The CWA also provides for citizen suits against Federal facilities for failing to obtain the necessary permits, violations of the terms of a permit, or violation of effluent standards or limitations. [Sections 505 a (1) and (f)]

The CWA makes it illegal for any person (including Federal facilities) to discharge pollutants from a point source into waters of the United States without a permit. [Section 301] Section 402 provides for the issuance of such permits [which may be issued by States -- See, Section 402 (a) (5)] under the National Pollutant Discharge Elimination System (NPDES), and Section 404 provides for the issuance of permits for discharges of dredged or fill material. *(Note: Certain Federal projects specifically authorized by Congress do not require Section 404 permits.)*

The 1987 amendments to the CWA ("The Water Quality Act of 1987") changed the responsibilities for Federal agencies, by requiring consistency of State identified Federal assistance programs and development projects with State nonpoint source (NPS) water pollution management programs:

> Subsection 319(b) (2) (F) requires that each State identify, as a part of its NPS Management Program, those Federal financial assistance programs and development projects for which the State will review individual assistance applications or development projects [under E.O. 12372 procedures] for "their effect on water quality" and consistency with the State's NPS management program. Such State review may include any Federal assistance programs and development projects "...which may have an effect on the purposes and objectives of the State's nonpoint source pollution management program." (emphasis added)

For the purposes of nomination of "Federal Development Projects" for State consistency review, the term shall include the land management activities (including the activities of Federal agency tenants, leasees or contractors) on/at Federal installations, facilities and lands.

B.3 Resource Conservation and Recovery Act

[PL 94-580, 42 USC 6901] (Enacted October 21, 1976; Amended: 1978, 1980, 1984).

The requirements of RCRA with respect to Federal facilities subject them to Federal, State and local requirements just as any nongovernmental entity.

- *RCRA Section 6001, Application of Federal, State, and Local Law to Federal facilities*, states that all branches of the Federal government, having jurisdiction over any solid waste management facility or disposal site, shall comply with Federal, State and local solid waste or hazardous waste disposal requirements. The President may exempt any solid waste management facility of any department if it is "in the paramount interest" of the United States. An exemption may be granted for one year.

There are several other sections of RCRA that have specific application to Federal facilities. These include:

- *Section 3004(u), Continuing Releases at Permitted Facilities, Section 3004(v), Corrective Action beyond Facility Boundary*, states that all treatment, storage and disposal facilities must satisfy new requirements. These requirements involve: a) identifying all solid waste management units at the facility; b) identifying releases of hazardous wastes or constituents that have occurred from those units; and c) performing corrective action for those releases. The provisions apply to all regulated facilities, inactive and closed as well as operating units. All Federal facilities are subject to corrective action requirements to the same extent as any facility owned or operated by private parties.

  The statute requires Federal agencies to operate under the same property-wide definition of "facility": the entire site under control of the owner or operator involved in hazardous waste management. In 1986, EPA interpreted ownership to refer not to the United States as a whole but rather to individual Federal departments, agencies, and instrumentalities. (51 Federal Register 7722 (1986)). At the same time EPA issued a notice of intent to propose rules indicating its intent to address three outstanding Federal facilities issues through rulemaking: recognition of specific subdivisions within a Federal agency, where appropriate, definition of "principle ownership" of property, and establishment of national priorities for cleanup (51 Federal Register 7723-24 (1986)).

- *Section 3007(c), Inspections*, states that the Administrator will annually inspect all Federal agency hazardous waste treatment, storage, and disposal facilities. Additional State inspections of such facilities may also occur.

- *Section 3016, Inventory of Federal Agency Hazardous Waste Facilities*, provides that each Federal agency must submit to EPA an inventory of the sites that it owns or operates or previously owned or operated where hazardous waste is or was stored, treated or disposed at any time. The inventory should include the following information:

  - Location of the site
  - Amount and toxicity of the waste
  - Extent of environmental contamination

10

- Current status of the site
- List of disposal sites at the facility and monitoring reports
- Response actions
- Identification of waste treated, stored, or disposed
- Name and address of the responsible Federal agency for each site.

If a facility does not provide adequate information, the Administrator shall notify the chief official of that agency. If after ninety days an inventory has not been developed, the Administrator shall carry out the inventory. EPA guidance for developing this inventory is issued every two years.

- *Section 6002, Federal Procurement*, states that each procuring agency must select those items made of the highest percentage of recovered materials practicable unless such items are unreasonable, fail to meet performance standards, or are only available at an unreasonable price.

- *Section 6003, Cooperation with Environmental Protection Agency*, states that all Federal agencies must make available all information required by the Administrator concerning past or present waste management practices and past or presently owned, leased or operated solid or hazardous waste facilities.

- *Section 6004, Applicability of Solid Waste Disposal Guidances to Executive Agencies*, states that Executive Agencies must comply with Solid Waste Management Regulations where the Agency:

    - Has jurisdiction over real property or the operation and management of a facility that is involved in solid waste management;

    - Generates solid waste and which, if conducted by a person other than the Agency, would require a permit or license to dispose of the waste.

- *Section 9007, Federal Facilities*, states that Federal facilities' underground storage tanks containing regulated substances or petroleum must comply with all Federal, State and local requirements. (Note there are also requirements for hazardous waste storage tanks regulated under Subtitle C of RCRA.) The President may exempt a Federal agency from compliance if it is determined to be "in the paramount interest of the United States". The exemption is granted for one year and may only be renewed at one-year intervals.

B.4 Federal Insecticide, Fungicide, and Rodenticide Act

[PL 92-516, 7 USC 136] (Enacted October 21, 1972; Amended: 1975, 1978, 1980 (reauthorization only))

In reference to Federal facilities, all Federal government agencies are required to meet the requirements specified in FIFRA. Section 18, Exemption of Federal Agencies, states that the Administrator may exempt any Federal or State agency from any provision of FIFRA if EPA determines that existing emergency conditions warrant such an exemption. In addition, under Section 4, a Federal agency, with EPA approval, may establish its own certification program for applicators or restricted use pesticides to enable Federal employees to apply restricted use pesticides.

B.5 Toxic Substances Control Act

[PL 94-469, 15 USC 2601] (Enacted September 28, 1976; Amended: 1981 (reauthorization only))

This statute specifies that all agencies of the Federal government must fully comply with its requirements. Section 22, National Defense Waiver, however, states that EPA, upon request of the President, may grant a waiver to a facility if it is in the interest of national defense.

Title II: The Asbestos Hazard Emergency Responses Act (AHERA, PL 99-519) was enacted into law as an amendment to TSCA on October 22, 1986. The law required EPA to develop regulations which provide a comprehensive framework for addressing asbestos problems in public and private elementary and secondary schools. On October 30, 1987, EPA published the Asbestos-Containing Materials in Schools Rule [40 CFR Part 763 Subpart E]. This New Rule requires all public and private elementary and secondary schools to inspect for friable and non-friable asbestos, develop asbestos management plans that address asbestos hazards in school buildings, and implement response actions in a timely fashion. References to the New Rule are provided throughout this Guide in brackets (e.g., [Section 763.85] and always refer to a section of Title 40 of the Code of Federal Regulations (40 CFR)).

AHERA also contains a separate *Section 203 (e): Treatment of Department of Defense Schools*. In addition, AHERA Section 213 required activities to conduct a study to find out the extent of danger to human health posed by asbestos in public buildings and the means to respond to any such danger. This study was completed in a Report to Congress in February, 1988.

B. 6 Comprehensive Environmental Response, Compensation, and Liability Act

[PL 96-510, 42 USC 9601-9657] (Enacted Dec. 11 1980; Amended 1982, and most recently by the "Superfund Amendments and Reauthorization Act of 1986" (SARA) [PL 99-499]).[2]

Former Section 107 (g) [42 USC 9607(g)] of CERCLA relating to Federal agency compliance was replaced by Section 120 of SARA ("Federal Facilities"). This section expands upon the sovereign immunity waiver formerly contained in CERCLA Section 107(f) and provides for Federal facility compliance, both substantively and procedurally, to the same extent as any nongovernment entity, including liability under Section 107 of CERCLA. SARA section 120 applies to all Federal facility response actions, including sites not listed on the National Priorities List (NPL). In addition to the Federal facility provisions in Section 120, SARA adds a citizen suit provision to CERCLA. (Section 310)

SARA Section 120 specifically addresses Federal facility hazardous waste cleanup actions by requiring Federal agency compliance with site assessments, hazard ranking and evaluation procedures for listing on the NPL. Federal facilities must comply with State cleanup standards that apply to removal and remedial actions, unless the State standards are more stringent for a Federal installation than for a non-Federal facility. Section 120 also requires Federal agencies to enter into Interagency Agreements (IAG) with EPA for the prompt completion of all necessary remedial actions.

---

[2] Enforcement and remedial response procedures under CERCLA/SARA are not addressed by this document. References to CERCLA/SARA have been included for informational purposes only.

In addition to the new requirements of Section 120, SARA Section 211 codified much of the existing DOD Installation Restoration Program as the "Defense Environmental Restoration Program" (DERP) under 10 U.S.C. 2701.

SARA Section 111 (e) (3) prohibits use of the Trust Fund at Federal facilities for remedial (i.e., cleanup) actions except for the provision of alternative water supplies in certain cases involving groundwater contamination. Other allowable uses of the fund at Federal facilities include costs of assessing injury to and restoration of any natural resources injured, certain costs associated with enforcement and abatement actions, epidemiologic studies, providing equipment needed to supplement services available from non-Federal entities, and costs to protect the health and safety of employees involved in response to hazardous substance releases, among others. [Section 111 (c)] See also, Executive Order 12580 at C.3, below.

SARA Section 111(d) also amends Section 111(c) of CERCLA to use the fund for certain costs incurred by ATSDR (Agency for Toxic Substances and Disease Registry), and also includes evaluation costs for preliminary assessment petitions, certain costs to oversee RI/FS conducted by PRPs, and costs of Federal and State oversight of remedial actions resulting from consent orders or other settlement agreements, amongst others.

SARA Title III: The Emergency Planning and Community Right-to-Know Act of 1986 establishes requirements for Federal, State and local governments and industry regarding emergency planning and reporting on hazardous and toxic chemicals. It is intended to encourage and support emergency planning efforts at the State and local level and provide community residents and local governments with information concerning potential chemical hazards in their communities. Federal agencies are not legally obligated to comply with the requirements of Title III, as Federal facilities are not included in the Title III definition of "person" in Section 329(7). EPA is encouraging affected Federal facilities to comply with the applicable provisions of Title III to the extent practicable. In addition, contractor operators of Government-Owned/Contractor-Operated (GOCO) facilities are subject to Title III to the same extent as any other operator and, therefore, are statutorily required to comply with the full range of requirements under the Emergency Planning and Community Right-to-Know Act.

B.7 Safe Drinking Water Act

[PL 93-523, 42 USC 300f, et seq.] (Enacted December 16, 1974; Amended 1976, 1977, 1980 and most recently by PL 99-339, "The Safe Drinking Water Act Amendments of 1986," enacted June 19, 1986)

The SDWA contains as broad a waiver of sovereign immunity as the Clean Air Act. Section 14479 (a) subjects all Federal agencies (1) having jurisdiction over any federally owned or maintained public water system or (2) engaged in any activity resulting, or which may result in, underground injection which endangers drinking water, to all Federal, State and local requirements "in the same manner, and to the same extent, as any nongovernmental entity." Federal facility compliance can be waived upon a request by the Secretary of Defense and a Presidential determination that waiver is necessary in the interest of national security. The SDWA also provides for citizen suits against Federal facilities (and others) for noncompliance. [Section 1449]

One of the major changes brought to the SDWA by the 1986 Amendments is the Section 1428 requirement for States to develop programs to protect wellhead areas. Section 1428(h) requires all Federal agencies having jurisdiction over any potential source of contaminants identified by a State wellhead protection program to be subject to and comply with all requirements of the State program, "as any other person, including payment of reasonable charges and fees." Presidential waivers are again provided for in the paramount interest of the United States.

C. EXECUTIVE ORDERS

This section discusses the Executive Orders which provide the framework for Federal compliance with environmental statutes -- Executive Orders 12088, 12146 and 12580. Key E.0. provisions for implementing EPA's Federal facilities strategy are highlighted below and provided in Appendix B.

C.1 Executive Order 12088 - Federal Compliance With Pollution Control Standards

E.0. 12088 established the Executive Branch process for ensuring Federal agency compliance with Federal, State, and local pollution control requirements on October 13, 1978. This Order clarifies that each Federal agency must ensure the compliance of all facilities under their jurisdiction and fully cooperate with EPA, State, interstate and local agencies to prevent, control and abate environmental pollution. The E.0. outlines an administrative process for resolution of compliance problems requiring full coordination between Federal agencies, EPA, and the Office of Management and Budget (OMB) when the EPA Administrator cannot resolve a dispute. This E.O. states that these administrative dispute resolution procedures are in addition to, and not in lieu of, other administrative and enforcement procedures designed to achieve expeditious compliance. Key provisions of E.0. 12088 include Federal agency responsibilities for:

- Cooperating and consulting with EPA, States and local agencies in meeting its pollution control responsibilities;
- Submitting pollution control plans to OMB via EPA;
- Requesting adequate funding for pollution controls; and
- Developing solutions to environmental problems.

In addition, the provisions of the E.0. require EPA to:

- Provide technical advice and assistance to Federal agencies to ensure cost-effective and timely compliance with pollution control requirements;
- Monitor Federal facility compliance with applicable standards; and
- Review and approve compliance plans and schedules submitted from Federal agencies violating environmental standards, when EPA has issued a notice of violation or notice of noncompliance.

E.0. 12088 also establishes that the EPA Administrator may refer Federal agency disputes that involve funding issues to OMB as described in Chapter VI.B.1.e of this strategy. In addition, this E.0. authorizes EPA to establish guidelines for Federal agency submission of annual Pollution Abatement Plans and review procedures to determine adequacy of pollution abatement funding. This process is described in detail in Chapter V.E of this strategy.

C.2 Executive Order 12146 - Management of Federal Legal Resources

Among other things E.0. 12146, signed on July 18, 1979, establishes the Federal Legal Council which consists of the Attorney General and representatives of fifteen Federal agencies. The Council is responsible for resolving problems that are beyond the capacity or authority of individual agencies. The Council is also responsible for resolving interagency disputes, including those concerning jurisdiction of programs and legal disputes between head agency officials. Under this executive order, legal disputes between Federal agencies are to be referred to the Attorney General for resolution.

C.3 Executive Order 12580 - Superfund Implementation[3]

E.O. 12580 (January 23, 1987 - revoking E.O. 12316 and amending E.O. 12088) addresses delegation of duties and powers assigned to the President in CERCLA as amended by SARA. It requires the National Contingency Plan (NCP) to provide for National and Regional "Response Teams" (NRTs and RRTs) composed of representatives from various Federal agencies to plan and coordinate preparedness and response actions. Normally chaired by EPA, agencies represented on the Response Teams include virtually all the Cabinet Offices as well as the EPA, Federal Emergency Management Agency (FEMA), U.S. Coast Guard, and the Nuclear Regulatory Commission (NRC). The RRTs may also include representatives from State and local governments and Indian tribal governments.

Among other things, the Order also delegates to EPA and the agency and department heads functions of the President as to response and certain related actions regarding releases or threatened releases within their various jurisdictions. Similar functions of the President related to remedial actions for releases or threatened releases which are not on the NPL are also delegated to agency/department heads.

Section 10 of Executive Order 12580, entitled "Federal Facilities," provides for the use of Executive Order 12088 dispute resolution procedures or other mutually acceptable procedures, when necessary, prior to the selection of a remedial action by the EPA Administrator. This section also states that "the Director of the Office of Management and Budget shall facilitate resolution of any issues."

---

[3] Enforcement and remedial response procedures under CERCLA/SARA are not addressed by this document. References to CERCLA/SARA have been included for informational purposes only.

CHAPTER III

IDENTIFICATION OF THE REGULATED COMMUNITY

III. IDENTIFICATION OF THE REGULATED COMMUNITY

The purpose of this Chapter is to clarify the definition of a "Federal facility," distinguish between the different types of Federal facilities subject to environmental requirements, and discuss the sources of information for identifying the universe of Federal facilities that must comply with environmental laws and regulations.

Establishing a more definitive "inventory" of Federal facilities is a necessary starting point for implementing this Strategy. It will enable EPA to effectively establish priorities and select targets for compliance monitoring and assistance activities within the Federal facilities universe. EPA will be better able to hold Federal agencies accountable for environmental compliance and also more accurately portray their compliance status. By focusing more on the subset of Federal facilities which are of environmental concern, EPA will be able not only to better regulate Federal facilities but also to provide technical assistance to those Federal facilities which have the greatest need.

A. DEFINITION OF A FEDERAL FACILITY

The Office of Management and Budget Circular No. A-106, dated December 31, 1974 defines a Federal facility as: "buildings, installations, structures, land, public works, equipment, aircraft, vessels, and other vehicles and property, owned by or constructed or manufactured and so leased to, the Federal government." This definition should be read in conjunction with any definitions of "facility" contained in specific environmental statutes. The Federal government owns some 387,000 buildings located within 27,000 installations on 729 million acres of land. Of these, approximately 5,000 Federal facilities have either requested environmental pollution abatement projects through the A-106 budget review process or are permit holders in one or more media.

This strategy addresses the subset of Federal facilities which have potential for environmental impact. This would include the 5,000 Federal facilities addressed through either the A-106 or permit processes, as well as other facilities and public lands of environmental concern. The total universe is likely to be more than 5,000 but much less than 387,000. See Exhibit III-1 for a conceptual diagram which depicts the potential Federal facility universe. This universe includes all Government-owned/ Government-Operated facilities (GOGO's) as well as other types of facilities which have been classified as Federal facilities for information system tracking purposes (see Exhibit III-1). As part of this strategy EPA will be undertaking further efforts to better identify and track the universe of Federal facilities.

B. STRATEGY FOR IDENTIFYING AND TRACKING THE UNIVERSE OF FEDERAL FACILITIES

A key activity critical to implementing this Strategy is the task of identifying and tracking the universe of Federal facilities. EPA will attempt to make better use of existing information and also initiate a number of projects aimed at upgrading data on Federal facilities in order to more accurately depict their compliance status. The purpose of this section is to discuss EPA's current approach as well as needed improvements for accomplishing this task. More specifically, this section:

- Identifies the types of Federal facilities and Federal lands that comprise the regulated community of Federal facilities;

or minor facility can directly affect the frequency of inspections, compliance tracking, enforcement actions and other EPA activities and policies at Federal facilities. A listing of EPA's media program definitions for major vs. minor facilities is included in Appendix C.

EPA currently identifies and tracks compliance of all major and selected minor Federal facilities. To date, this has been accomplished primarily by the individual media program information systems. Information in these systems for Federal facilities is consistent with the tracking done for other types of regulated entities. In order to determine compliance status for Federal facilities, this information must be extracted individually from each of the media program systems and consolidated by the Office of Federal Activities (OFA) into a single list. The limitation of such a list is that it involves only media program majors and possibly a few minor Federal facilities. As part of this strategy, OFA and the Regional Federal Facilities Coordinators will be working with the program offices to improve the quality of information and tracking of Federal facilities' inspections, compliance status and enforcement activity.

EPA will utilize all available sources of information to better identify and track the compliance status of Federal facilities that are subject to environmental requirements, including:

- *Media program information systems* that track compliance data, inspection activities, and enforcement actions at sites or sources identified as the regulated community. These systems generally track only majors, although some systems track a limited number of minors which may include some Federal facilities. GSA assigns identification numbers to all Federal facilities and installations except those facilities on public lands. EPA and State media programs are required to use this identification number for Federal facilities in their information systems. Exhibit III-4 describes the information systems currently operational for each program and the data available on Federal facilities.

- *A-106 submissions* that are provided to EPA by all Federal agencies with funding requests for environmental pollution control projects at individual Federal facilities. This is a useful source for cross-checking with program source lists and other sources of information on Federal facilities since a specific A-106 request for a pollution abatement project is an indication that a facility has operations of potential environmental significance and impact to suggest the need to include them in the list of Federal facilities to be tracked. Chapter V provides detailed information on the A-106 process.

- *Strategic Planninq and Management System (SPMS)* which provides a framework for EPA to set goals and priorities, plan EPA and State actions, manage and track performance and compliance status, and identify areas for in-depth evaluation.

- *Facility Index System (FINDS)* which consists of an inventory of facilities, including Federal facilities that are subject to environmental regulations, is managed by EPA's Office of Information and Resources Management (OIRM). FINDS data includes: the EPA identification number, name, address, type of facility and source records that denote which EPA program system maintains information about the facility. The Regions are responsible for maintaining and inputting the data element for the type of facility (e.g., GOGO, GOCO, etc.). This system is a useful tool for cross-checking information, seeing where overlap exists among programs, and identifying Federal facilities which may have multi-media concerns.

- Describes available sources of information and program data systems utilized by EPA to identify and track compliance at Federal facilities; and
- Outlines key strategy initiatives that EPA will undertake to improve the quantity and quality of information on the Federal facilities universe.

B.1 Identifying the Types of Federal Facilities in the Regulated Community

Identifying the Federal facility universe for purposes of reporting on and promoting high levels of Federal facility compliance is not necessarily a simple matter as Federal agencies frequently have complex relationships with private parties. There are numerous Federal facilities and public lands which have some level of private party involvement in operating the facility, leasing a facility or lands for private uses or for other purposes. Exhibit III-2 provides definitions of the various types of facilities and Federal leased lands which make up the regulated community of Federal facilities and identifies whether they are tracked as Federal facilities or private parties in Agency information systems. Note that this exhibit does not, however, indicate the party against which EPA will direct its enforcement response to a violation. In a number of instances non-federal parties will be the focus for enforcement as described in Chapter VI. B.2.b.

For tracking purposes, most types of Federal facilities and lands on this list are identified in Agency information systems as Federal facilities. The primary exception to this are Contractor Owned/Contractor Operated (COCO's and COCO(E)) facilities which are tracked as private parties. Additionally, certain agency information systems indicate when a Federal facility is government-owned but contractor-operated (i.e., a "GOCO" facility). Chapter VI, Section B.1 of this document explains against which party -- i.e., Federal or private -- EPA generally will direct its initial enforcement response when violations are identified at Federal facilities where there is some private party involvement.

In addition, all Federal facilities are assigned an identification number by the General Services Administration. EPA uses these Federal facilities identification numbers for tracking purposes in its various media program information systems. Exhibit III-3 contains a detailed explanation of how these identification numbers are derived for individual Federal facilities.

It should be pointed out here that American Indian lands (i.e., reservations) do not fall within EPA's definition of "Federal facilities" and this compliance strategy does not apply to American Indian lands. The EPA approach to administering environmental programs on Indian reservations is contained in the EPA Indian Policy issued by the Administrator in November, 1984. The Indian policy outlines some basic principles for cooperating with Tribal Governments to help achieve and maintain environmental compliance and for taking appropriate action when noncompliance problems are identified. In addition, EPA media program offices are developing regulations and policies to define how EPA's authorities will be implemented on Indian lands.

B.2 Improved Use of Available Information and Existing Data Systems

Most of EPA's media programs identify regulated facilities as either "major" sources or "minor" sources depending on a variety of factors such as facility size, annual emissions, toxicity of effluents, sensitivity of the receiving environment, etc. Certain programs also have defined "significant minor" facilities. Being classified as either a major

- *Federal Facilities Information System (FFIS)* which is the master inventory of all ongoing A-106 submissions along with selective compliance data obtained from the media program systems and the Federal Facilities Coordinators. FFIS will contain data on Federal facility pollution abatement projects, inspection information, enforcement actions, and yearly budget or funding totals for abatement projects. This system's capability to track compliance information beyond A-106 submissions is limited. It is anticipated, however, that the system will be very useful for this purpose in the future.

- *Other Information Sources* - Information from State program data bases and inspection reports are useful inventory sources, especially for minor facilities. Regional and Headquarters permit and inspection files are a source of information on Federal facilities and should be utilized to the extent possible to identify the universe of Federal facilities and enable better tracking of their compliance.

B.3 Special Initiatives

As part of this Strategy, EPA will be undertaking a number of selected initiatives to improve the quality and quantity of the information it has on the Federal facility universe and to develop a better picture of the compliance status of Federal facilities. Further guidance on these initiatives will be issued by OFA in cooperation with affected program offices. Examples of such initiatives include:

- *Federal Agency Reclassification Review* - OFA will provide other Federal agencies with media program definitions of major and minor facilities to give them an opportunity to identify facilities which may need to be reclassified. OFA and the media programs will use this information to assist in verifying and updating EPA's classification of facilities.

- *Review of Major/Minor Definitions* - OFA will be working with selected program offices in reviewing certain media program definitions of majors to ensure that unique classes or types of Federal facilities are covered by their majors definition.

- *Regional Lists of Important Federal Facility Minors* - Regional Federal Facilities Coordinators, in consultation with media programs, will develop a list for each media program of those minor Federal facilities which do not meet the media program definition of a major source but which, due to certain complexities, locational factors, facility types, compliance patterns or other unique features, are considered potentially environmentally significant in a media program area. These lists should be limited to a manageable number of the minor Federal facilities in each media program. The Federal Facilities Coordinator will be responsible for tracking the compliance status of the facilities on this list through all available means including informal communications with delegated States or other arrangements through the State/EPA enforcement agreements process or annual workplans.

- *Regional Lists of Environmentally Significant Federal Facilities* - In FY 1987, Regional Federal Facilities Coordinators, in consultation with media program offices, developed name lists of those Federal facilities which are potentially the most environmentally significant when considered on a multi-media basis. Generally, this list will be limited to a maximum of ten Federal facilities per Region and will be updated annually. These facilities will be considered as candidates for multi-media inspections. Multi-media inspections are generally most appropriate for large facilities with multiple process operations regulated under several environmental statutes. This list of potential environmentally significant Federal facilities will be developed by examining the compliance status of each Federal facility and the extent of program priorities located at each facility. Factors to be considered should include whether the facility is a significant noncomplier or significant violator in one or more programs, whether the facility is a repeat violator, the number of program major sources located at the facility or installation, the number of "significant minors" located at the facility and other considerations.

- *The EPA National Enforcement Investigations Center Federal Facilities Ranking System* - This system is appropriate for identifying environmentally significant Federal facilities. This ranking system uses available information to identify "high priority" Federal facilities based upon their relative potential for environmental problems. In FY 1987, Federal Facilities Coordinators began developing Federal Facility Compliance Management Plans for the top Federal facilities identified in each Region in cooperation with the media program offices.
- *Improved Use of the A-106 Process for Addressing Identified Program Priorities* - Each year, EPA will identify a limited number of media program priorities and request Federal agencies to direct some of their A-106 projects at facilities which will have to address existing noncompliance problems or future compliance planning in these areas. New facilities to be tracked may be identified through this process. This is explained in more detail in Chapter V.

EXHIBIT III-1

THE FEDERAL FACILITY UNIVERSE

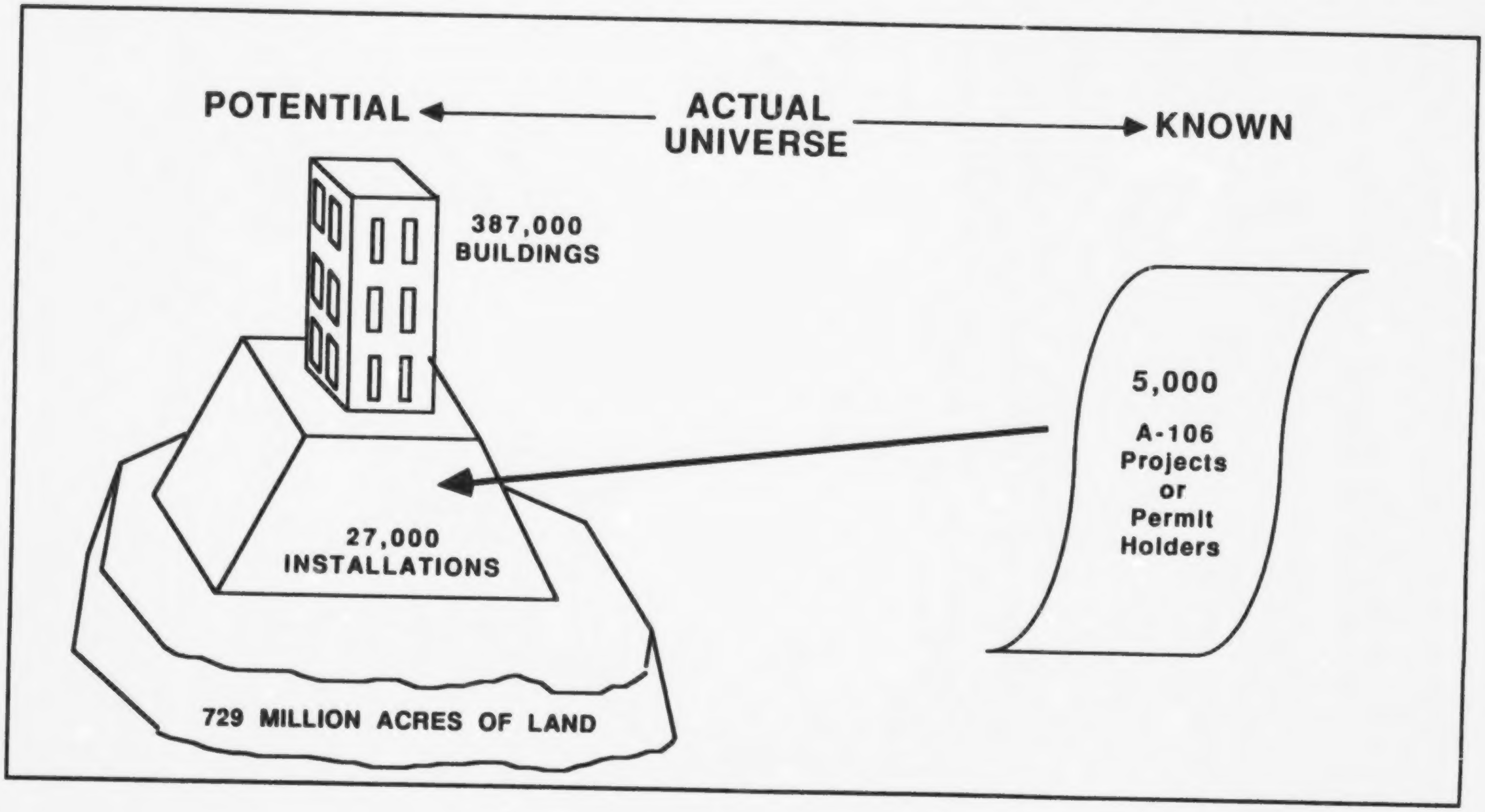

POTENTIAL
ACTUAL UNIVERSE
KNOWN
387,000 BUILDINGS
27,000 INSTALLATIONS
729 MILLION ACRES OF LAND
5,000
A-106 Projects or Permit Holders

EXHIBIT III-2
IDENTIFICATION OF THE REGULATED COMMUNITY OF FACILITIES WITH FEDERAL INVOLVEMENT

Acronym/ Term	Definition	Classification for Information System Tracking Purposes:[1]
GOGO	Government owned/government operated facility is the traditional Federal facility where the government owns and operates all regulated activity.	Federal facility.
GOCO	Government owned/contractor operated facility is owned by a Federal agency but all or portions of it are operated by private contractor(s).	Federal facility (or GOCO in some program information systems).
COCO	Contractor owned/contractor operated facility is a non-government owned, privately operated facility that provides goods and/or services to a Federal agency under contract.	Private party.
COCO(E)	Same as COCO, however, contractor may be furnished government equipment to manufacture a product or provide a service.	Private party.
POGO	Privately owned/government operated is a facility where the government leases buildings or space for its operations.	Federal facility where a single agency occupies all or most space in a building.
GOPO	Government owned/privately operated is a facility where the government has leased all or part of its facility to a private operator for their operation and profit.	Federal facility.
Leasee	Parties granted use of government land by a rental or real estate agreement or title transfer with a reversionary clause (municipal landfills, oil and gas, mining, grazing, agricultural, industrial operations, parks and marinas).	Federal agency lands.
Grantee	Parties having received a grant for permanent authorization to use government land or given a right of way. Grants usually involve a single payment for the land or transfer of land use rights.	Private Party.

---

[1] Note that for tracking purposes these classifications may differ on the treatment as described in Chapter VI, Exhibit VI-3, on enforcement responses.

EXHIBIT III-2
(Continued)
IDENTIFICATION OF THE REGULATED COMMUNITY OF FACILITIES WITH FEDERAL INVOLVEMENT

Acronym/ Term	Definition	Classification for Information System Tracking Purposes:[1]
Claimant	Parties having properly located, recorded and maintained mining claims under the 1872 mining law on Federal lands for which a patent has not been issued.	Federal agency lands when available for entry under the 1872 Mining Law.
Patent Holder	A mining claimant who has met the statutory requirements of the 1872 Mining Law and has been issued a permit.	Private Party (when permit has been issued).
Permittee	Parties granted a permit for short-term use of government land.	Federal agency lands.
Withdrawal from Public Use	Permit granted to a Federal agency or instrument of the Federal government to use land of another Federal agency for up to twenty years administratively as long as intended use does not involve destruction of the land (i.e., military uses, dams). Congressionally mandated withdrawals are generally permanent changes of administration of Federal lands to accommodate more destructive uses of such lands.	Federal agency administering the lands.

---

[1] Note that for tracking purposes these classifications may differ on the treatment as described in Chapter VI, Exhibit VI-3, on enforcement responses.

Exhibit III-3

Federal Facilities Identification Numbers

The Federal Information Processing Standards (FIPS) #104 is the publication which issues the guidelines to implement the structure of the American National Standards Institute (ANSI) Codes:

- ANSI Codes - the representation of Names of Countries, Dependencies, and Areas of Special Sovereignty

The two-character alphabetic FIPS codes are provided for general use and recommended by the International Organization for Standardization (ISO) for international interchange:

- ISO Codes - provides for the complete coverage of the land areas of the world without overlaps or duplication of entity names approved or accepted by the United States Board on Geographic Names (US BGN).

This one-digit "variable" position expresses one of two data information sources, Federal Facility Information System (FFIS) or the Facility Index System (FINDS). FFIS generates a hyphen for a Federal Facility ID Number (monitors projects in Pollution Abatement Plans) and FINDS generates a numberic check character.

Agency/Bureau (in DOD, Agency/Major Command) code is a four-digit numeric character combination which reflects the responsible Federal agency and Bureau of a facility. The first and second characters of this numeric combination are assigned by the U.S. Treasury when an agency is established. This code also assists the Office of Management and Budget (OMB) in the identification of each individual agency for issuance of approved appropriations. The third and fourth characters are assigned by General Services Administration (GSA), Financial Management Information Division, after the verification of the establishment of bureau functions.

General Services Administration (GSA) Installation code is a five-digit numeric combination assigned by GSA, Office of Government-Wide Policy and Oversight Division, in blocks to the requesting Federal agency. The annual Quarterly Report of Real Property Owned by or Leased to the United States (GSA Form 1166) is submitted by each agency (usually through Real Estate and Space Management or the like) identifying each installation where funds are expended for land, buildings and other structures and facilities.

Exhibit III-3
(continued)
Federal Facilities Identification Numbers[1]

A K
- FIPS Code
  - Assigned by National Bureau of Standards

-
- Hyphen* for FFIS Code
  - Numeric** for FINDS Code
    - EPA Information Systems

6 8
- Numeric Agency Name Code
  - Assigned by Treasury and part of Agency's appropriation identification

0 0
- Bureau/Major Command Code
  - Assigned by GSA, Financial Management Information Division

7 1 3 7 5
- GSA Installed Number
  - Assigned by GSA, Government-Wide Policy and Oversight Division
    - Designated by Federal Agency
      - Annual Quarterly Report of Real Property Owned by or Leased to the United States (GSA Form 1166)
        - Prepared in Agency's Real Estate and Space Management, Facilities and Support Office

EXAMPLES

*	Figure 1	FFIS	AL-213724337	=	US Army Training and Doctrine Command for McClellan, AL
**	Figure 2	FINDS	OR-3891406354	=	DOE Bonneville Power Administration Troutdale Substation, Troutdale, OR

---

[1] "Federal Facilities Identification Number" is essentially synonymous with these other frequently used terms: GSA Number, FFIS Number and FINDS Number.

EXHIBIT III-4
PROGRAM INFORMATION SYSTEMS

Media Program	Information System
Air/CAA	*Compliance Data System (CDS)*: CDS contains information on the compliance status and enforcement activities at all major and many minor stationary sources of air pollution.
	National Emission Data System (NEDS): NEDS contains data on amounts of emissions of criteria pollutants by major and minor stationary sources of air pollution.
Water/NPDES	*Permit Compliance System (PCS)*: PCS tracks private parties or Federal facilities which either have an NPDES permit or have applied for one. It contains general information on all major and minor permits and tracks compliance status for all major and selected minor sources.
Water/SDWA	*The Federal Underground Injection Control Reporting System (FURS)*: FURS is an inventory system used to identify well locations. It identifies wells by State, type of well, operating status, and whether they are on Federal or Indian land.
	The Federal Reporting Data System (FRDS): FRDS contains inventory, violation, and enforcement information for the Public Water System Supervision (PWSS) program.
Hazardous Waste/CERCLA	*Comprehensive Environmental Response, Compensation, and Liability Information System (CERCLIS)*: CERCLIS is an inventory of all uncontrolled hazardous substance sites in the United States and its territories which are known to EPA, including Federal facilities. CERCLIS contains site identification data, program descriptions, financial obligations and expenditures, monthly task plans, and site alias names and locations.
Hazardous Waste/CERCLA	*Case Management System (CMS)*: CMS files contain general site information and data on administrative orders, civil actions, settlements, and planned enforcement activities for CERCLA sites. Data on Federal facilities are obtained from the States, Regions, and Headquarters and consolidated into a separate file.

EXHIBIT III-4
(Continued)
PROGRAM INFORMATION SYSTEMS

Media Program	Information System
Hazardous Waste/RCRA	*Hazardous Waste Data Management System System (HWDMS)*: HWDMS tracks inspections, violations, and enforcement actions at Federal facilities. HWDMS also containsdata on waste process design type and capacity information, and facility level data.
Pesticides & Toxic Sustances/FIFRA & TSCA	*FIFRA and TSCA Tracking System (FFT)*: FFTS is a pc-based tracking system which enables user to do all of the following: record inspections and impart reviews, manage samples, establish referrals, review cases, develop enforcement actions and generate various reports.
Toxic Substances/TSCA	*The Chemicals in Commerce Information System (CICIS)*: CICIS is a computerized data base of public and confidential information on all available chemicals in the TSCA chemical inventory. CISIS identifies the chemical, case number, manufacturer, volume and confidentiality.
General Enforcement Data/All Programs	*The Docket*: The Docket is a computer information system used by OECM to track civil enforcement litigation. The information contained in the system includes case dates, filing dates, violations identified for each statute, and penalties sought.
State Program Information Systems	Many State program data systems contain inventories of minor facilities.

CHAPTER IV

COMPLIANCE PROMOTION, TECHNICAL ASSISTANCE AND TRAINING

IV. COMPLIANCE PROMOTION, TECHNICAL ASSISTANCE AND TRAINING

Achieving a complying majority is a fundamental prerequisite for obtaining broad scale compliance. Compliance promotion activities are designed to reach out and promote compliance in the first instance before violations can occur. The Federal facilities program is unique in that the Executive Order 12088 specifically requires EPA to provide "technical assistance" and advice to other Federal agencies.

A primary purpose of EPA's Federal Facilities Compliance Program is to assist Federal agencies in demonstrating leadership in environmental control practices through the maintenance of high levels of compliance with environmental statutes. If adequate attention and effort is paid to more "up-front" compliance assurance activities by Federal agencies and preventing violations, this should help to reduce the number of enforcement actions against Federal facilities for violations that could have been prevented in the first place.

This Chapter highlights the use of preventive approaches through increased compliance promotion activities, improved technical assistance and training, and more emphasis on addressing patterns of noncompliance on a Federal agency-specific basis.

A. COMPLIANCE PROMOTION

Compliance promotion entails various techniques that are available to prevent or anticipate compliance situations, enhance public relations and perceptions of Federal compliance, and improve working relationships among Federal agencies. The following mechanisms are among those which can and will be used to promote and help ensure better "up-front" environmental compliance within the Federal facility community.

A.1 Information Transfer

The first step in fostering improved compliance is assuring that Federal facilities are aware they are subject to environmental requirements and then explaining what they mean. Federal facilities must understand what they are expected to do and how their performance will be evaluated. Where complex regulations are involved, "plain English" translations, workshops or other educational efforts may be necessary to ensure adequate understanding and effective implementation by the entire regulated community, including Federal facilities. The Office of Federal Activities (OFA) and the Regional Federal Facilities Coordinators will make every reasonable effort to inform affected Federal facilities of new or revised regulatory or statutory environmental requirements.

The Office of Federal Activities at EPA Headquarters holds meetings of the EPA Federal Agency Environmental Roundtable each month for top environmental officials of all Federal agencies headquarters offices. At these monthly meetings, OFA disseminates up-to-date information on new and upcoming regulations, initiatives, policies, procedures, guidance, etc. Representatives of EPA program offices participate by briefing the Federal agencies on key media-specific developments in their respective areas. Information on various training opportunities and available technical assistance services also is passed on to "Roundtable" participants. The agency representatives subsequently disseminate this information to their respective field offices and affected facilities, as appropriate.

Regional Federal Facilities Coordinators also will begin conducting regularly-scheduled meetings similar to the Headquarters OFA Roundtable meetings. The Federal Facilities Coordinators will invite key environmental personnel from all Federal facilities and agencies in their respective Regions to these meetings. Regional program offices should participate in these meetings to help explain key regulatory requirements to Federal facilities personnel. In addition, each Region will conduct an annual multi-media technical workshop for Federal facilities aimed at providing technical assistance in key compliance areas in each program. These workshops will be coordinated by each Regional Federal Facilities Coordinator with appropriate participation by each of the Regional media program offices.

OFA will continue to serve as a clearinghouse/information exchange center for communicating with the Federal agencies about EPA's programs and should serve as the conduit for sharing information among the Regions and States on innovative ideas, programs and strategies that work effectively. A systematic communication system for exchange of information will be established by OFA to enable this process to function more efficiently. OFA will establish more formal lines of communication and have key points of contact in each of the program offices for Federal facilities compliance.

In addition, EPA issues a monthly publication, the EPA Journal, to communicate key environmental issues to the public. Each issue usually focuses primarily on one overall topical area (e.g., hazardous waste management) and contains a number of articles written by both EPA employees and other technical experts in the field. Subscriptions to the EPA Journal are available to the general public and to Federal agency personnel currently at a rate of $11.00 per year. Exhibit IV-1 describes the magazine and contains information on how to obtain subscriptions.

A.2 Identifying Compliance Patterns of Federal Agencies

There are two types of compliance patterns that need to be addressed: (a) current, and (b) potential compliance pattern problems.

Since many Federal agencies have a nationwide organizational structure and wide geographic distribution of facilities, EPA has a unique opportunity to work with other Federal agencies and the States to identify broad patterns of current and potential compliance problems which are or may become typical among facilities in a given agency. For example, it may be that due to the nature of its mission a certain agency has many laboratories which generate relatively small quantities of hazardous waste and the proper temporary storage and disposal of this waste has caused some compliance problems. In such a case, OFA could work with the parent Headquarters office of this Agency to inform them of the identified problem and encourage them to work with their field offices to correct these problems on a nationwide basis. Similarly, Regional Federal Facilities Coordinators should work with each Federal Agencies' next highest level of authority (e.g., Major Commands in DOD) to have them correct identified generic problems at their individual facilities. The effective use of environmental auditing, as discussed above, is one means Federal facilities may utilize to internally identify potential compliance problems and correct them before they become violations.

(a) *Current Patterns*:

Current patterns of compliance problems at Federal Agencies can be identified through several mechanisms:

(1) Available compliance information systems should be used to develop lists of compliance problems at Federal facilities and analyze emerging patterns by Federal Agency.

31

(2) The A-106 Pollution Abatement Plans should be analyzed to identify, through the types of projects that are being requested, patterns of compliance problems at a particular Federal agency.

(3) The EPA review of (1)-(2) above should be supplemented by discussions with the States on patterns of noncompliance by Federal facilities in their States. In order to more effectively identify these patterns of compliance problems in each agency, the Regions should hold annual meetings with States in their respective Regions to discuss patterns of noncompliance among Federal facilities on an agency-by-agency basis. The meetings may most usefully be combined with other meetings, such as State reviews of A-106 plans.

The results of these discussions will be reported to OFA by the Regional Federal Facilities Coordinator. In this way, a comprehensive strategy for correcting these noncompliance patterns can be developed and implemented. OFA will seek resolution of national noncompliance patterns from the parent agency Headquarters office. OFA will hold meetings with the top environmental officials of each Federal agencies' Headquarters offices to identify these problems and discuss strategies for addressing them. EPA's National Compliance Program Managers should also participate in this meeting.

(b) *Future Patterns*:

The A-106 Pollution Abatement Planning Process, outlined further in Chapter V, can also be used to anticipate future potential compliance pattern problems. As part of the annual A-106 planning process, Federal agencies will be informed of the EPA priority areas and requested to direct some of their A-106 projects to these key areas. (See Chapter V)

A.3 Environmental Auditing

On July 9, 1986, EPA issued a formal Agency-wide "Environmental Auditing Policy Statement" (FR Vol. 51, No. 131, p. 25004), included here in Appendix D. This statement specifically encourages Federal facilities to adopt sound environmental management practices, particularly environmental auditing, to help achieve and maintain compliance with applicable environmental requirements as well as to help identify and correct unregulated environmental hazards.

Environmental auditing is a systematic, documented, periodic, and objective review by regulated entities of their facility operations and practices related to meeting environmental requirements. Environmental auditing includes a variety of compliance assessment techniques which go beyond those legally required and are used to identify actual and potential environmental problems. Effective environmental auditing can lead to higher levels of overall compliance and reduced risk to human health and environment.

With respect to Federal facilities, the EPA policy states that:

- Where appropriate, EPA will enter into agreements with other Federal agencies to clarify respective roles, responsibilities, and commitments of each agency in conducting and responding to Federal facility environmental audits.
- When Federal agencies discover significant violations through an audit, EPA encourages them to submit the audit findings and a remedial action plan to the EPA

Regional office, even when not specifically required to do so. EPA will review the audit findings and action plan and either prepare a response approval form as described in Section VI.B.1.b. or, should the violation require long-term corrective action, EPA will negotiate a Compliance Agreement as discussed in section VI.B.1.c.

- To the extent feasible, EPA will provide technical assistance to help Federal agencies design and initiate audit programs.

In 1984, EPA conducted a workshop introducing the concept of environmental auditing for Federal agencies. In 1988, EPA sponsored a follow-up nationwide Environmental Auditing Conference for Federal agencies to help further develop and refine skills in this area. In addition, the Appendix to the EPA policy statement entitled "Elements of Effective Environmental Auditing Programs" (contained in Appendix D of this Strategy), describes the general features of effective environmental auditing programs. This information should be useful to those Federal agencies initiating auditing programs. In FY 1988, EPA also is developing two guidance documents for Federal agencies to assist them in establishing and implementing environmental auditing programs at their facilities:

- *Environmental Auditing Program Design Guidelines for Federal Facilities* - This document presents general guidelines to Federal agencies to assist them in either establishing a new environmental auditing program or institutionalize existing auditing activities into a comprehensive ongoing program. It should assist agencies in determining key program elements such as audit frequency media coverage, program scope, protocol development and auditor selection.

- *Model Environmental Audit Protocol for Federal Facilities* - This protocol is a multi-media guidance document which will provide detailed instructions for qualified individuals to follow in conducting environmental audits at Federal facilities. It is more than a standard checklist since the protocol consists of step-by-step directions to auditors on what records must be reviewed, what physical features must be inspected, who needs to be interviewed, what questions should be asked, etc. Separate protocols will be included for each media (e.g., air, water, hazardous waste). In addition, this model protocol is designed in a manner which will allow Federal agencies to insert applicable state and local environmental regulations, as well as any appropriate internal Federal agency policies, regulations or guidelines.

In FY 1987, EPA issued a report entitled "A Review of Environmental Auditing Activities in Federal Agencies." This report contains a review of the status of environmental auditing programs in 36 different Federal departments or agencies. EPA conducted this review of Federal agency environmental auditing activities in order to determine: (1) the nature and extent of major findings of EPA's review and analysis of Federal auditing programs.

Each of the 36 Federal agencies was reviewed for a number of features (e.g., scope, frequency, purpose) common to audit programs, and the report describes each program in standard 1-2 page summaries. Based on this review, each program was placed in one of the following four categories as defined below:

- *Comprehensive program* - A formal permanent auditing program has been established within the agency, including at least an evaluation of facility compliance with all applicable Federal, State, and local environmental regulations. A comprehensive program will generally have many, if not all, of the program elements identified in EPA's environmental auditing policy statement.

- *Partial program* - A formal permanent auditing program has been established within the agency, but the scope is focused on one or more specific topical areas or media. Agencies with partial programs may or may not have specific procedures or plans for determining which facilities to audit.

- *Program under development* - Developing programs may be characterized by one or more activities such as: hiring a contractor to develop an auditing protocol; initiation of the first formal comprehensive audit; audits conducted on a limited number of topical areas with firm plans for expansion into other areas; or a written management commitment to start a program.

- *No program* - A formal permanent auditing program has not presently been established within the agency and there are not any known plans for developing such a program. These agencies are generally undertaking other types of environmental management and monitoring activities but are not actually auditing their facilities.

As of FY 87 almost half (17) of the 36 agencies reviewed either have established an auditing program or have initiated the development of a program. Nineteen agencies do not currently have a program in place. EPA recognizes that the existence of an environmental auditing program does not necessarily mean a facility is in compliance with all environmental regulations and the lack of such a program does not mean a facility is out of compliance. However, EPA believes that environmental auditing can help Federal facilities assure their own compliance and has recommended that those Federal agencies which do not have auditing programs consider adopting one in the future. Copies of this report can be obtained by making a request to: U.S. EPA, Office of Federal Activities (A-104), 401 M St., S. W., Washington, D. C. 20460.

B. TECHNICAL ASSISTANCE AND TRAINING

Executive Order 12088 requires EPA to provide "technical assistance and advice" to other Federal agencies "in order to ensure their cost-effective and timely compliance ..." with environmental laws. It is the primary responsibility of OFA and EPA's Regional Federal Facility Coordinators to ensure that Federal agencies are afforded such assistance. The Regional Coordinators themselves, provide general compliance program assistance to Federal facilities and generally request needed technical assistance from the media program offices. In some States, technical assistance may also be available to the Federal facility from the state regulatory agencies.

B.1 Technical Assistance

The technical assistance provided by EPA to Federal facilities may take a variety of forms. It is often provided through workshops or meetings with Federal Facility personnel where the technical details of implementing the requirements of a new rule or regulation are explained. Technical assistance also is provided through guidance documents developed by the media programs to assist the regulated community. Federal agencies and specific facilities also may request technical assistance from EPA on specific needs (e.g., installation of groundwater monitoring). EPA will provide such technical assistance where resources allow or on a cost-reimbursement basis from Federal agencies. "Hotlines" to respond to technical questions from the regulated community have been developed by EPA for a number of media programs and are available for use by Federal facilities. (See Section B.2 below)

Through the Federal agency A-106 pollution abatement planning process, explained in more detail in Chapter V, proposed projects are evaluated by EPA for adequacy in the areas of engineering, timing, and cost. This should ensure that projects are technologically appropriate and adequately funded. EPA reviews of the engineering aspects of individual A-106 projects are generally limited to technology assessments to determine whether they appear to be meeting applicable EPA technical standards and guidelines. Federal Facility Coordinators, and Regional program staff, in certain cases, also may participate in pre-planning meetings and design review conferences for major A-106 projects. These reviews are the primary means by which EPA provides "projects level" technical assistance to Federal facilities.

Action plans and schedules developed in response to identified violations are also reviewed by EPA for technical adequacy and timeliness in responding to the noted violations. In addition to the coordination and communication role which the Federal Facilities Coordinators play in this process, Regional program offices may also be directly involved in such reviews due to their technical expertise and experience in media-specific areas.

It also is important to clarify that EPA generally does not provide any specific project level technical assistance to Federal facilities in the context of ongoing enforcement actions. As such, if an EPA program office has determined that a Federal facility is in violation and has issued an enforcement action to the facility, EPA will not provide direct technical assistance on correcting the violation in question. To do so could unduly compromise EPA enforcement prerogatives and responsibilities in its ongoing enforcement proceedings. However, EPA may provide certain types of assistance if they are agreed to as part of a signed Compliance Agreement, Memorandum of Understanding, or Consent Order issued by EPA.

B.2 EPA "Hotline" Assistance

EPA is among the many government and nonprofit agencies currently using 800 numbers to offer a broad range of information and services free of charge to consumers, including Federal agency personnel. EPA's 800 numbers, operating up to 24 hours a day, seven days a week, are ready to respond to questions on topics ranging from pesticides use to asbestos in homes; from hazardous waste disposal to chemical emergency preparedness; from waste, fraud, and abuse to job vacancies.

Information on an even broader range of environmental topics may be obtained by calling EPA's commercially accessible information numbers. For the price of a telephone call, the interested consumer or Federal employee can get a wealth of information on toxic substance control, air toxics, the status of regional hazardous waste cleanup efforts, interpretation or clarification of EPA regulations and guidance, as well as many other concerns.

Appendix E contains a compilation of information on current EPA Hotlines available for public and Federal agency use. EPA encourages use of these information services to assist Federal facilities in ensuring their own compliance with all environmental requirements.

B.3 Federal Facilities Compliance Program Assistance and Oversight

Beyond the technical assistance provided by media program staff to Federal facilities, the Regional Federal Facility Coordinators play a role in providing Federal facilities with more general compliance program assistance and oversight. Such assistance usually takes place through Coordinator visits to Federal facilities and focuses on an evaluation of the facilities overall environmental management systems and capabilities. The Federal Facilities Coordinator, in consultation with Regional media program offices, generally identifies potential compliance problem areas and makes recommendations on how a facility can improve its environmental management operations and practices.

Most of the compliance program assistance and oversight provided in the past by Regional Federal Facilities Coordinators was somewhat ad hoc and informal. However, Regional Federal Facilities Coordinators are now developing Compliance Management Plans for the most environmentally significant Federal facilities identified in each Region based on the factors discussed in Chapter III of this strategy and additional OFA guidance on preparing and implementing Compliance Management Plans.

B.4 Training Opportunities for Federal Facilities Compliance Personnel

As part of this Strategy, EPA will be making a more systematic effort to market existing training opportunities to Federal agencies and to target those Federal facilities with identified compliance problems in specific areas. OFA will coordinate an Agency-wide effort to establish a more formal technical assistance and training program for Federal facilities compliance. This will consist primarily of formalizing and coordinating into a complete package much of what is currently taking place on a more informal and ad hoc basis in Headquarters and the Regions in the areas of training, information exchange and technical assistance. Increased emphasis will be placed on Regional Federal Facilities Coordinators and Headquarters OFA to coordinate with program offices to ensure availability of spaces for Federal facilities environmental personnel in EPA training courses.

Program offices should provide OFA and the Federal Facilities Coordinators with any available information on training courses. Headquarters OFA will develop a consolidated training manual annually for dissemination to all Federal agencies. States are also encouraged to invite Federal agencies to attend their training courses, when appropriate. OFA will attempt to target particular agencies for courses in areas where an agency has had a pattern of compliance problems identified by EPA or States. Federal Facilities Coordinators should notify Federal facilities in their Region of these courses and target facilities which have had violations/problems for specified courses, e.g., a Federal facility with continuing O&M problems at a wastewater treatment plant should be targeted to attend the Publicly Owned Treatment Works operator training course.

OFA has worked with the Office of Administration and Resources Management in the development of the EPA Training Institute and with OECM on the design and implementation of the EPA Inspector training initiative. Federal facilities managers and environmental personnel will be invited to attend inspector training sessions to upgrade their compliance management capability.

OFA also will be evaluating the current on-the-job-training program in which environmental officials rotate through some EPA Headquarters offices to learn about EPA programs and establish contacts. Expansion to other Federal agencies will be considered in an effort to enhance the capability of the Federal agencies to carry out their own environmental programs. Personnel exchange programs between EPA and other Federal agencies are also being explored by OFA. Similar opportunities should also be made available in the Regions.

EXHIBIT IV-1

The Environment... From A to Z

EPA JOURNAL
EPA JO
EPA JOURNAL
Taking a Global View

EPA is charged by Congress to protect the nation's land, air and water systems. Under a mandate of national environmental laws, the agency strives to formulate and implement actions actions which lead to a compatible balance between human activities and the ability of natural systems to support and nurture life.

The EPA JOURNAL is published by the U.S. EPA. The JOURNAL hones in on emerging issues as well as perennial problems that beset the world we live in. Biotechnology. Wastewater treatment. The "greenhouse effect." Hazardous waste cleanups. Pesticides. The protection of ground water. The EPA JOURNAL provides an in-depth analysis of all these topics and many more.

The annual rate for subscribers in the U.S. is $11.00. Anyone wishing to subscribe to the JOURNAL should enclose a check or money order payable to the Superintendent of Documents. The request should be mailed to:
Superintendent of Documents, GPO, Washington, D.C. 20402

CHAPTER V

COMPLIANCE MONITORING

V. COMPLIANCE MONITORING

This Chapter identifies the major compliance monitoring tools available for detecting compliance problems and violations at Federal facilities and explains how they will be utilized as part of EPA's overall inspection strategy for Federal facilities. These compliance monitoring tools and activities include source self-monitoring, reporting, and recordkeeping, EPA and State inspections, and the Federal Agency A-106 process for submission of pollution abatement plans.

Through effective implementation of this Strategy, EPA plans to strengthen its compliance monitoring activities at Federal facilities and ensure that EPA or the States' "presence" is demonstrated at all Federal agencies which have the potential for environmental impact. Ensuring adequate coverage will require increased and improved coordination between EPA's Regional Federal Facility Coordinators and Regional program offices and delegated or authorized States.

A. OBJECTIVES OF COMPLIANCE MONITORING ACTIVITIES

The overall goal of EPA's Federal Facilities Compliance Program is to establish a comprehensive and proactive approach to achieving and maintaining high rates of compliance at Federal facilities. In order to accomplish this, EPA must meet the objectives of its compliance monitoring activities at Federal facilities which are to:

- Review the compliance status of Federal facilities to identify potential violations;
- Establish a strong enforcement presence at all Federal agencies having facilities or lands with the potential for environmental impact;
- Collect evidence necessary to support enforcement actions for identified violations; and
- Develop an understanding of national compliance patterns within Federal agencies and the compliance status of the Federal facility subset of the regulated community in order to:
    - Assist in targeting inspection activities;
    - Establish compliance/enforcement priorities;
    - Evaluate program strategies;
    - Communicate information to the public; and
    - Prevent recurring violations.

EPA establishes priorities for compliance monitoring activities to achieve these objectives. In addition to established media program priorities, other factors to be considered in targeting such activities at Federal facilities may include:

- The significance of violations identified in the past for a particular source, category of sources or at Federal facilities;
- The extent to which patterns of noncompliance have been identified at certain Federal facilities or within Federal agencies; and

40

- The extent of source review needed to establish a strong enforcement presence among all Federal agencies.

B. SOURCE SELF-MONITORING, REPORTING AND RECORDKEEPING REQUIREMENTS

Federal facilities are required to follow all of the self-monitoring and reporting requirements contained in EPA statutory and regulatory requirements and media program guidance. EPA and States utilize source self-monitoring and reporting data in targeting inspections and screening for violations and other compliance monitoring activities.

Most of the major pollution control statutes provide EPA with broad authority to obtain information from regulated entities, including Federal facilities. In some cases, the statutes themselves require regulated entities to collect specified information and report to EPA. These statutes also authorize EPA to require facilities to compile, store and report data to verify compliance. These provisions call for a variety of different reporting, recordkeeping and self-monitoring schemes. The statutes also authorize EPA and delegated State and local authorities to enter Federal facilities to collect information and review records.

The resulting legal requirements can be placed into seven broad categories:

(1) Periodic performance reporting (e.g., National Pollution Discharge Elimination System Discharge Monitoring Reports, Excess Emission Reports);

(2) Recordkeeping (e.g., Clean Air Act (CAA) Sections 114(a)(1) and 311(a));

(3) Notification and reports of problems (upsets, bypasses, spills) (e.g., Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) Section 103(a) and Section 8(e) of Toxic Substances Control Act);

(4) Reports of information needed for non-enforcement regulatory matters in response to specific orders from EPA (e.g., CAA Section 114 order to obtain information to set New Source Performance Standards);

(5) Reports of compliance or other pollution data in response to specific orders (e.g., Resource Conservation and Recovery Act (RCRA) Section 3013);

(6) Requirements that EPA (and State) inspectors be allowed to examine facilities, records, etc. and to sample wastes; and

(7) Non-emergency notification requirements (e.g., RCRA Sections 3005, 3010, and 3016).

(Appendix F contains a summary of the reporting, recordkeeping and self-monitoring requirements in each of these categories under the CAA, the Clean Water Act, CERCLA, RCRA, and TSCA).

The above list demonstrates EPA's (and delegated or authorized States') broad authorities to require reporting and recordkeeping. It also emphasizes the need for Federal facilities to keep track of their own compliance status using any required methods, as well as whatever other means they deem reasonable (such as environmental auditing), to provide themselves with relative information to meet such requirements. It is important to note that because of the importance of self-reporting and recordkeeping to EPA's compliance monitoring efforts, EPA places high priority upon enforcement actions, including criminal prosecutions, in cases of deliberate distortion and/or falsification of self-monitoring data.

In addition to these regulatory requirements, Federal facilities may do additional self-monitoring through internal environmental management activities including environmental auditing. When Federal agencies discover significant violations through an environmental audit, EPA encourages them to submit the related audit findings and remedial action plans to the EPA Regional Office (and State agencies where appropriate), even when not specifically required to do so.

C. INSPECTION STRATEGY FOR FEDERAL FACILITIES

Most compliance programs rely on inspections as an important component for determining compliance. EPA's established media program priorities for conducting inspections (e.g., major facilities annually) are generally followed for Federal facilities to the same extent as for other types of sources. Exhibit V-1 outlines the types and frequencies of media program inspections which are conducted at regulated sources, including Federal facilities, by EPA and delegated or authorized States.

The EPA inspection strategy for Federal facilities is for EPA and delegated States to conduct inspections at Federal facilities consistent with the priorities and frequencies established in each of the media programs for all other sources. These inspections, however, will be complemented by a number of other compliance monitoring activities aimed at ensuring that Federal facilities are receiving their required number of program inspections and that adequate coverage or "presence" is being demonstrated for all Federal agencies which have facilities or lands of environmental concern. Implementation of this inspection strategy calls for increased coordination and communication between Federal Facilities Coordinators and the media program offices in each of the Regions. In addition, Federal agencies may supplement these compliance monitoring activities with their own internal environmental programs. Many of the activities outlined below are directly tied to the improvements in identifying the Federal facilities universe discussed in Chapter III and the compliance promotion efforts explained in Chapter IV.

C.1 Annual Inspection Planning

Regional Federal Facilities Coordinators will meet at least annually with each of the media program offices to review proposed Regional and State inspection plans in order to ensure that Federal facilities are being inspected as often as required by program guidance. Exhibit V-1 can serve as a general guide for required inspection frequencies in each program, although States may inspect more frequently at their discretion. Regional Federal Facilities Coordinators also should discuss with each of the program offices their plans for oversight inspections of Federal facilities, where media programs are authorized or delegated to the States. This is to ensure that Federal facilities receive the same percentage of oversight inspections as all other sources of equal problem potential. Federal Facilities Coordinators should participate in selected media program oversight inspections of Federal facilities to the extent resources and travel funds permit. Certain Headquarters program offices and NEIC also conduct inspections of Federal facilities. When possible, OFA will attempt to notify the Regional Federal Facilities Coordinators when such inspections are scheduled.

Federal Facilities Coordinators will provide input into both program grant negotiations with the States and the State/EPA enforcement agreements process. Federal facility inspections, planned by both EPA and States, should be compiled by the Federal Facilities Coordinator for consolidated compliance tracking of inspection results. This compilation should be based upon information provided from program offices. Coordinators will regularly review these schedules to ensure they are receiving information on the results of inspections, including any enforcement actions taken.

C.2 Regional Reporting of Inspection and Enforcement Activities at Federal Facilities

Each quarter, the Regional Federal Facilities Coordinators submit name lists to the Office of Federal Activities through EPA's Strategic Planning and Management System (SPMS) of those Federal facilities which have been inspected during the preceding quarter by either EPA or the States. The FFC's also report whether the facility has been determined to be in violation and whether or not they have received an EPA or State enforcement action. This information is used by OFA to track compliance status on an agency-by-agency basis. In addition, beginning in FY 89, EPA's Regional media program offices will submit copies of NOV's and other enforcement actions issued to Federal facilities to EPA Headquarters. This information will be submitted to the appropriate Headquarters media enforcement office with copies sent to the Office of Federal Activities and the Regional Federal Facilities Coordinator. EPA will formally transmit this information to the Headquarters offices of the affected Federal agencies. Arrangements shall be made between OFA and each EPA media program regarding how and when this information shall be transmitted to the other Federal agencies. The transmittal shall explain that they have a compliance problem or violation at one of their facilities and request that they take appropriate action to help expedite resolution and correct the identified violation. OFA will also use this information in its quality assurance checks of Federal agency A-106 submissions to ensure that problems are being adequately addressed and funded.

As a follow-up to this Strategy, Headquarters media program offices may develop more detailed guidance on the policies and procedures to be followed for submittal of this data (e.g. as required by the RCRA program in OSWER's 1/25/88 and 3/24/88 memoranda). At a minimum copies of all enforcement actions issued by EPA to Federal facilities must be submitted to Headquarters. Actions issued to Federal facilities by delegated or authorized States should also be submitted by States to the EPA Regional offices and then to Headquarters whenever possible. EPA Regions shall make every effort to acquire this information from the States through the annual State/EPA enforcement agreements or other means as appropriate. This is discussed in more detail in Section C.4.b. and in Chapter VII on State/EPA agreements.

C.3 Identification of Environmentally Significant Federal Facilities for Multi-Media Inspections

As noted in Chapter III, in FY 87 Regional Federal Facilities Coordinators in consultation with media program offices, developed name lists of those Federal facilities which are potentially the most environmentally significant when considered on a multi-media basis. This list will be updated annually by each Region using information from EPA's National Enforcement Investigation Center Federal Facilities Ranking System as described in Chapter III.B.3. statutes. Federal Facilities Coordinators will provide this list to the Regional Environmental Services Division to discuss the possibility of conducting multi-media inspections at these facilities. As part of the annual inspection planning process with the States, the Regions will discuss possible multi-media inspections of

Federal facilities and will invite affected States to participate in any multi-media inspections of Federal facilities in their State.

C.4 Coordination with States on Federal Facilities Inspections

Since most EPA environmental programs are authorized or delegated to the States, they generally have the primary responsibility for conducting inspections, including those done at Federal facilities. EPA and the States agree on the numbers of sources that will be inspected annually through State/EPA grant negotiations. These grants are based primarily on numbers of major sources but States generally conduct many more inspections of minor sources than is required by EPA. The number of Federal facilities that are a major source is a relatively small percentage (approximately 10%) of the total Federal facility universe. It is important, therefore, that States inform EPA of any State inspections of minor Federal facility sources in order for EPA to develop a more accurate picture of Federal facilities compliance status and to provide technical assistance, as appropriate. This can be effectively accomplished through a combination of both formal and informal mechanisms to be arranged by each Region with their respective States on a media program basis, as appropriate. The State/EPA Enforcement Agreements discussed in Chapter VII are a particularly good formal mechanism for this purpose.

C.4.a Annual Meeting with States on Federal Facilities Compliance

EPA Regions will meet annually with all of the States in their respective Regions to identify and discuss patterns of noncompliance at Federal facilities, including any violations or compliance patterns identified through EPA or State inspections. Regions may hold one meeting for all States or hold separate meeting for each State. The results of this meeting(s) will be included in an annual status report to OFA on Federal facilities compliance, by Federal agency, to be prepared by the Regional Federal Facilities Coordinator, in consultation with the media program offices.

C.4.b State Reporting on Federal Facility Compliance Status

As a minimum, Regions generally will receive the same information from delegated States on Federal facility compliance status and enforcement activities as they presently receive for other sources. This information generally is reported to EPA by the States on a quarterly basis, although some programs receive certain information on a monthly basis and it is broken down separately for Federal facilities for most programs. Program offices should ensure that Regions and States are reporting Federal facilities compliance information separately where required. This periodic reporting can be supplemented with specific requests for information on a case-by-case basis to follow-up on identified violations or for special Agency-wide targeted initiatives.

In addition, Regions should request that States routinely submit additional information on Federal facilities compliance status (e.g., inspection reports, enforcement actions, etc.) if mutual agreement can be reached on this through the State/EPA "enforcement agreements" (discussed in more detail in Chapter VII). As explained above in Section C.2., EPA plans on submitting copies of all enforcement actions to affected Federal agencies to help expedite resolution of identified violations. The States may find such Headquarters assistance useful in resolving compliance problems at Federal facilities.

D. ACCESS TO FACILITIES REQUIRING SECURITY CLEARANCES

Certain facilities, including those with military, intelligence, nuclear related and law enforcement functions, have special security or access requirements necessitated by the facility's mission. It is the policy of EPA to meet these special requirements to the maximum extent possible, since these requirements generally do not conflict with the goals of EPA's environmental compliance responsibilities. Where necessary, EPA or State inspectors must obtain the appropriate clearances for access to national security information, facilities or restricted data at Federal facilities. Where information has been classified, restricted or protected for national security, law enforcement, or other similar reasons, all such information is to be maintained in accordance with the originating agency's requirements.

EPA has programs for personnel security, document security, and protection of confidential business information. Protection of information from release has not adversely affected EPA's environmental mission to date and EPA staffs with these responsibilities can provide assistance to inspection and compliance personnel in meeting these special access or security requirements if such access is allowed by the specific statute. EPA personnel in need of security clearances for inspections or other compliance monitoring activities should contact the Personnel Security Staff at EPA Headquarters to obtain information on how to obtain necessary security clearances. State personnel should first contact the Federal agency. If problems or inordinate delays are encountered, they should ask the EPA Regional Federal Facility Coordinator for assistance in obtaining needed clearances.

E. SUBMISSION AND REVIEW OF FEDERAL AGENCY A-106 POLLUTION ABATEMENT PLANS AND PROJECTS

Section 3(a)(3) of Executive Order 12088 requires that Federal agencies submit Pollution Abatement Plans[1] semi-annually to EPA for review. The process for developing and maintaining these plans is described by the Office of Management and Budget (OMB) Circular No. A-106 dated December 31, 1974 (See Appendix G). Through this established process, Federal facilities plan projects in order to ensure continuing compliance to meet new regulatory requirements, or to correct problems or violations identified by the EPA or States. As part of this strategy, EPA will be attempting to improve the A-106 process to address more effectively potential compliance problems at Federal facilities before they become violations and to focus Federal agency attention on identified EPA media program compliance priorities.

The development of Pollution Abatement Plans provides a mechanism for Federal Agencies to analyze their current and projected funding requirements for their pollution abatement projects. These reports also provide agencies with information to plan for future program resource requirements. To be fully effective the A-106 five-year plan must be coordinated and staffed internally within each individual Federal agency.

---

[1] The terms Pollution Abatement Plan, Five-Year Plan and Pollution Status Report are essentially synonymous and are used interchangeable. Pollution Abatement Plans are Five-Year Plans and are prepared by Federal agencies. The Pollution Status Report is a compilation of Federal agency plans prepared by EPA.

45

Consistent with the provisions of the Anti-Deficiency Act discussed in Chapter VI B.1.j., EPA will advise the Federal agencies and OMB on obtaining the required funding levels for pollution abatement projects through various means, such as:

- Requesting supplemental appropriations
- Reprogramming of appropriated funds
- Utilizing the established appropriations process.

E.1 Identification of Priority Projects

The A-106 process is primarily a system of setting priorities so environmental control projects are completed as required to meet statutory and regulatory requirements. There are never enough funds available to complete all desired projects in one fiscal year. The A-106 process is a five-year plan which programs projects over an extended period of time. The primary focus of the process is to give the highest priority to those facilities that are out of compliance or will go out of compliance if project funding schedules are not met. A-106 is unique within the government budgeting system in that it directs EPA to review Federal agency plans for OMB to ensure that these plans will be adequate to meet promulgated compliance deadlines. Where they are not adequate, EPA will recommend to OMB that Federal agency budget requests be revised to meet established priorities.

E.1.a A-106 Compliance Classes

OMB has established a hierarchy of 9 different compliance categories divided into 3 distinct classes. EPA places its highest priority on Class I projects. These projects are needed at Federal facilities which are in physical noncompliance and/or have received an enforcement action from EPA or a State. The following three categories are included in Class I:

- CMPA - Projects needed to support a signed Compliance Agreement or Consent Order.

- INOV - Projects needed to correct deficiencies cited on an inspection or Notice of Violation (NOV) by a regulatory authority.

- ESDP - Other projects which are required immediately because a statutory or regulatory deadline has passes.

Class II projects are next in priority to EPA. These projects are needed at facilities which are not yet out of compliance, but will be if not implemented prior to certain deadlines in the future. Class II projects are the most difficult to program for because the required compliance dates are in the future, standards may still be in the process of being established, and no inspections will have been conducted by regulatory agencies. Nevertheless, if Federal agencies do not initiate their remedial plans now, it is inevitable they will be out of compliance when the deadlines arrive. The Federal Planning, Programming, and Budgeting System (PPBS) is very complex and takes too long to arrive at quick fixes for substantial projects. Class II projects make up a substantial part of Federal agency unfunded requirements and are divided into two categories:

- ESDF - Projects for facilities which do not meet established standards, but the compliance deadline is in the future.

46

- PSDF - Projects for facilities where there is a pending standard that cannot be met and the compliance deadline is in the future.

Where Federal agencies have not planned for projects in this class, there may be a requirement for EPA to provide additional technical assistance to ensure they are aware of the requirements.

Class III projects include a potpourri of situations which are of less importance to EPA at the present time but which may be important compliance issues in the future, if n constructed. While of less importance to EPA, they may be a very high priority to the Federal agency. This class includes the following:

- ESRO - Facility meets established standard but needs replacement because of obsolescence.
- ESRE - Facility meets established standard but needs expansion or will go out of compliance.
- ESDL - Facility meets established standards but project is needed for other than compliance reasons. Will demonstrate leadership.
- OTHR - Other reasons not falling in categories described above.

E.1.b Targeting Resources To Address Priority Areas

In addition to compliance status priorities, EPA media programs normally establish yearly program priorities which describe those areas where they will target inspections and otherwise place their limited enforcement resources. Since EPA and State regulatory authorities have decided these are their most important environmental concerns, it would be appropriate for Federal agencies to become aware of and target their resources in a similar direction. EPA will communicate its priorities to other Federal agencies to the extent they are released to the general regulated community.

At the beginning of each fiscal year OFA will coordinate with the Headquarters media program offices to identify a limited number of media program priorities. OFA will request Federal agencies to direct their pollution abatement plans at those facilities which have noncompliance problems in these key areas.

Federal Facility Coordinators and Regional program staff will develop lists of those Federal facilities which fall under each of these priority areas. Federal agencies will be informed of the EPA priority areas prior to the start of their annual A-106 planning process. Regional Federal Facility Coordinators will review proposed and final A-106 budget submissions to ensure that acceptable projects have been requested for facilities identified as having noncompliance problems in these media program priority areas. This approach to addressing program priorities is in addition to, and not in lieu of, EPA's regular use of the A-106 process as explained below.

E.2 A-106 Process Overview and Time Table

The annual A-106 process begins each October at the start of the fiscal year as shown in the timetable of key A-106 events in Exhibits V-2. At this time, copies of the most recently updated list of pollution abatement projects (Pollution Status Reports) and the latest report to OMB are provided to the Regional program staff by the Federal Facilities

Coordinator for their continuing review and analysis of priority areas as described above. The Regional program staff review the list of projects and recommend funding and/or schedule changes to be incorporated into the Federal agency's next A-106 submission.

Concurrent with the Region's review of the projects in the Pollution Status Report, Federal agencies review and update their plans. The results of this review are reflected in revised five-year plans which Federal agencies submit to OFA by December 15. New projects are submitted at this time using EPA Form No. 3500-7 (See Exhibit V-3).

OFA then prepares a revised Pollution Status Report which is distributed in January to all Federal agencies and EPA Regional offices for review. The EPA Regional reviews are coordinated and quality assured by each of the Federal Facilities Coordinators. The media program staffs conduct the reviews and provide their comments to the Federal Facilities Coordinator (section V.E.3 discusses state participation in the A-106 process for delegated programs.) Each project is reviewed to determine its adequacy in three specific areas: (1) Engineering; (2) Timing; and (3) Cost. The EPA Regions also evaluate each project as either High, Medium or Low in terms of its impact on the environment if not funded in the fiscal year requested. In addition, the Regions identify "additional needed" projects which Federal agencies have not proposed or submitted for review.

The marked-up Pollution Abatement Plan worksheets and any inadequate or additional needed project sheets are then submitted by the Regions to OFA in April. OFA subsequently sends the Federal agencies copies of their worksheet and any inadequate or needed project sheets. These sheets contain the Regional staffs' explanations as to why a project has been rated either "inadequate" or "needed". The Federal agencies then respond to EPA's review by filling out a standard response format and updating their previous plan submissions. Copies of the EPA Inadequate and Needed Sheets and the Federal Agency Response Formats are included as Exhibit V-4.

Federal agencies must submit their revised updates of the January report to EPA Headquarters by May 31. OFA then prepares a revised report which is distributed to the EPA Regions by the end of June for the last review of the fiscal year. OFA also provides the Regions with worksheets and the Federal agencies responses to the EPA Inadequate and Needed project sheets. During this review Regions focus on those projects in the President's Budget Year (currently +2). Regional staff also will review the submissions to ensure that projects have been proposed to correct violations identified in EPA and State inspections and noncompliance problems in identified program priority areas.

OFA consolidates Regional comments and provides them to EPA Headquarters program staff for review and concurrence. In September, the Administrator provides OMB with a summary of the budget year projects and EPA's evaluations. OMB uses this information in its review of Federal agency budget requests.

In October, the most recent Pollution Status Report (i.e., the report revised and distributed in June) and the Report to OMB are distributed to EPA and Federal agencies, initiating the process for the next fiscal year's budget.

On an ongoing basis throughout the fiscal year, the Federal Facilities Coordinators will visit Federal facilities in their respective Regions to attend preliminary planning and design review conferences on major A-106 projects. At a minimum, Coordinators should assist in planning and design reviews for all A-106 projects which are over one million dollars in total cost and for other lesser cost projects which have significant environmental impact. Federal Facilities Coordinators should request assistance and participation from EPA program offices on technical matters where necessary and appropriate.

E.3 State Participation in the A-106 Process

Where programs are delegated to States, Regions will provide States with an early opportunity to become involved in the review of Federal agency A-106 submissions on proposed pollution abatement projects. Each Region will provide their respective State agencies with copies of A-106 reports for their States. Each Region will then meet with their States during the January - March review period to review and discuss proposed projects as they relate to State enforcement actions against Federal facilities, general compliance needs of facilities, and identified noncompliance problems. This State review may consist of a review of abbreviated Pollution Status Report prepared by OFA, annual or biannual A-106 submittals from the Federal agencies or some other summary report prepared by OFA or Regional offices.

EXHIBIT V-1
MEDIA PROGRAM INSPECTIONS

MEDIA PROGAM	FACILITY	FREQUENCY*	TYPES OF INSPECTIONS
RCRA	All Federal Facility TSD's	Annual	• Compliance evaluation inspection: - Ground water - Record review - Site inspection
		Every 3 years	• Comprehensive monitoring evaluation for ground water
	Generators and Transporters	4 times/year	---
	Solid/Hazardous Waste Management Units at TSD's	---	• Identification SWMU's or determination of releases through RFA's and RPI's
NPDES	Major Minor	Major = annually Minor = as resources allow	• Compliance sampling • Compliance evaluation • Performance audit • Toxic
CAA (Stationary Sources)	Class A-1 Sources and all NESHAPS	Annual	• Level II - minimum acceptable inspection • Level III - detailed inspection of process and operating equipment
	Class A-2 Sources	Biannual	---
	NSPS Sources	Quarterly EER reports	
	Class B VOC Sources Other	Per Statistical model in small source Strategy (7/6/87)	
	Class B Sources (minors, excluding NESHAPs)	At State's discretion	---

---

*These are the Laboratories minimum inspection frequency requirements. EPA or States may and often do inspect sources more frequently.

EXHIBIT V-1 (Continued)
MEDIA PROGRAM INSPECTIONS

MEDIA PROGAM	FACILITY	FREQUENCY*	TYPES OF INSPECTIONS
CAA (Mobile Sources)	Vehicle Fleets	Discretionary; can be random or directed	• Inspection of vehicles and fueling facilities
FIFRA	Production sites, use inspections distributor/ dealer inspections	States establish individual priorities within established national criteria also based on individual chemical strategies	• "Establishment" inspection/ compliance inspections
		Plus response to complaints	• Compliance inspection
	Laboratories	Every 2-3 years	• Data audits (Federal inspections only) • GLP compliance inspection
TSCA	Laboratories	Every 2-3 years	• Data audits
	Facilities with PCB's and asbestos (worker protection and schools) subject to TSCA §4, 5, 8, 13	Response to complaint selection under a neutral administrative inspection scheme (NAIS)- specified in individual strategies	• Compliance inspections (§4,5,8,13 are Federal inspections only)
SDWA (PWSS)	All community water systems	Every 3 years	• Sanitary Survey
	Persistent Violators	Annual	• Compliance Inspection

---

* These are the Laboratories minimum inspection frequency requirements. EPA or States may and often do inspect sources more frequently.

EXHIBIT V-1 (Continued)
MEDIA PROGRAM INSPECTIONS

MEDIA PROGAM	FACILITY	FREQUENCY*	TYPES OF INSPECTIONS
SDWA (UIC)	Class IV wells (Hazardous waste wells over water sources)	Annual (Top Priority) (non banned)	• Mechanical Integrity • Tests (MIT's)
	Class I wells	Annual	• All MITs, corrective actions and pluggings to be witnessed
	Class III wells	Generally Annual	• Routine with 25% MITs
SDWA (UIC) (Cont'd)	Class II wells	Routine inspections to follow up on complaints	• Routine inspection with 25% of MITs to be witnessed
	Class IV wells	Inspected when found or suspected of polluting Underground sources of drinking water (USDW)	• Routine inspections

---

[*] These are the Laboratories minimum inspection frequency requirements. EPA or States may and often do inspect sources more frequently.

EXHIBIT V-2
ANNUAL TIMETABLE OF KEY A-106 EVENTS

September 15	Federal Agency Pollution Abatement Plans (5 yr. plan) distributed to EPA Regions for information and initial review and Federal agencies for initial update.
December 15	Revised Pollution Abatement Plans (5 yr.) due from Federal Agencies only to EPA Headquarters, OFA.
January	Revised Pollution Abatement Plans and Worksheets distributed to EPA Regions for primary evaluation. Regions send copy of Pollution Abatement Plans to States for their review. Meetings held with States, as appropriate.
	Simultaneously, Pollution Abatement Plans returned to Federal Agencies by OFA for second update.
April 15	Evaluations of Federal Agency Pollution Abatement Plans, including worksheets, due from EPA Regions to EPA Headquarters, OFA.
May	OFA coordinates evaluation of Pollution Abatement Plans with Headquarters media programs.
	OFA concurrently provides EPA evaluation of Pollution Abatement Plans with Federal Agencies for inclusion in their next update and EPA identifies any potentially needed projects.
May 31	Revised Pollution Abatement Plans, from Federal Agencies due to EPA Headquarters, OFA.
June	Draft Report and work sheets distributed to EPA Regions for final update and concurrently to Federal Agencies for comment.
August	Final evaluation of projects in Draft Report due from EPA Regions to Headquarters EPA, OFA. Formal comments on draft OMB report received from Federal agencies. EPA Headquarters program office review, comment, and concurrence on draft OMB Report.
September 1	Annual EPA report due to OMB.
September 15	Repeat annual (FY) cycle of events.

EXHIBIT V-3

EPA FORM NO. 3500-7

Reproduced from best available copy.

United States Environmental Protection Agency
Washington, DC 20460

EPA

Federal Agency Pollution Abatement Plan — Project Report

I. Facility Information

1. State Alpha
2. Agency/Bureau
3. GSA Installation
4. EPA Region
5. Country
6. New Installation ☐ Yes ☐ No
7. Name of the Installation
8. Street Address
9. City Name
10. ZIP Code, if known
11. Ownership Type

II. Basic Project Information

1. Agency Project Number
2. Various Locations ☐ Yes ☐ No
3. Media
4. Pollutant Category
5. Funding Account
6. Year Funding Required
7. Project Name *(Brief description)*
8. Project Contact Name
9. Contact Telephone
10. Total Cost Estimate *(in $1,000's)*

11. Project Assessment

☐ **High (H)** Project critical to Agency program and/or cleanup of local environment

☐ **Med (M)** Project important to Agency program and/or cleanup of local environment

☐ **Low (L)** Project desirable to Agency program and/or cleanup of local environment

12. Compliance Status ☐ CMPA ☐ INOV

☐ **ESDP** Does not meet established standard and compliance deadline has passed

☐ **ESDF** Does not meet established standard and compliance deadline is in the future

☐ **PSDF** Does not meet pending standard and compliance deadline is in the future

☐ **ESRO** Meets established standard but needs replacement due to obsolescence

☐ **ESRE** Meets established standard but needs replacement due to need for expansion

☐ **ESDL** Meets established standards but needs to demonstrate leadership

☐ **OTHR** Other

13. Project Cost

Fiscal Year	Budgeted *($1,000)*	Funded *($1,000)*
	.	.
	.	.
	.	.
	.	.
	.	.

14. Project Milestones/Progress *(All dates are month/year)*

Design/Plan Completion	Construction/Work Start	Construction/Work Completion
Final Compliance Required	Progress Code	Fiscal Year Completed

For DOE Use Only

Program ID

Field Office

Project Narrative *(including description of legal requirement and pollutants to be controlled)*

EPA Form 3500-7 (Rev. 8-86) Previous edition is obsolete.

10/87

EXHIBIT V-4

FEDERAL AGENCY RESPONSE FORMAT
(INADEQUATE PROJECT)

DATE:________

FFID#____________________ PROJECT#____________________

1. Do you agree with EPA's determination that this project is "inadequate"? YES___ NO*____

2. Do you agree with EPA's recommendation on how to correct this inadequacy? YES___ NO*____

3. What action do you plan /have you planned to correct this inadequacy? (Describe)

____
____
____
____
____
____

4. Have you updated your A-106 submission to include this change? YES___ NO* ____

5. If inadequacy was because of cost, what is your new estimate of project cost? $__________(000)

6. In which Fiscal Year(s) do you now expect project will be funded?

   FY87___ FY88___ FY89___ FY90___ FY91 Will not be funded___

7. What type of funds will be used?
   O&M___ MILCON___ DERA___ PEMA___ OTHER (specify)____________

8. Was this "determination of inadequacy" discussed with the Regional EPA Point of Contact (POC)? YES___ NO ____
   Name of POC if different from opposite page ____________________

9. Comments:

____
____
____
____
____
____

10. Name/Title/Office of Staff Member preparing this form:

____
____

Telephone Number: FTS____________________ Commercial____________

* IF "NO" PLEASE EXPLAIN IN "COMMENTS" SECTION

Draft EPA Format 87-4

EXHIBIT V-4

FEDERAL AGENCY RESPONSE FORMAT
(NEEDED PROJECT)

DATE:__________

1. Do you agree that there is a problem that needs to be addressed? YES______ NO* ______
2. Do you agree that a project is needed to address the problem? YES______ NO* ______
3. Do you agree with EPA's recommendation? YES______ NO* ______
4. Do you plan to program a project to correct this situation? YES______ NO* ______
5. Have you updated your A-106 submission to include this project? YES______ NO* ______
6. What is your estimate of cost of project? $________(000)
7. In which Fiscal Year(s) do you expect project will be funded?

   FY87___ FY88___ FY89___ FY90___ FY91___ Will not be funded___
8. What type of funds will be used?

   O & M___ MILCON ___ DERA___ PEMA___ OTHER (specify)__________
9. Was this recommended project discussed with the Regional EPA Point of Contact (POC)? YES______ NO________

   Name of POC if different from opposite page ____________________
10. Comments:
11. Name/Title/Office of Staff Member preparing this form:

    Telephone Number:FTS____________Commercial____________

* IF "NO" PLEASE EXPLAIN IN "COMMENTS" SECTION

CHAPTER VI

ENFORCEMENT RESPONSE TO COMPLIANCE PROBLEMS AND VIOLATIONS OF ENVIRONMENTAL LAWS AT FEDERAL FACILITIES

VI. ENFORCEMENT RESPONSE TO COMPLIANCE PROBLEMS AND VIOLATIONS OF ENVIRONMENTAL LAWS AT FEDERAL FACILITIES

This Chapter outlines the basic approach and procedures which EPA uses when responding to violations of environmental law at Federal facilities.[1] It explains the concept of timely and appropriate enforcement response and why it is important to gaining high levels of compliance. It discusses unique features of Federal enforcement procedures, State enforcement responses to Federal facility violations as well as the enforcement roles and responsibilities of each level of government. EPA media program offices also may develop specific enforcement guidance for Federal facilities through either their annual Operating Guidance or in other program policy documents. However, any media-specific enforcement guidance which is issued for Federal facilities will be consistent with the basic framework and concepts set forth in this strategy.

In summary, EPA and States are to pursue "timely and appropriate" enforcement responses to address violations at Federal facilities in a manner similar to actions taken to address violations at non-Federal facilities. EPA's enforcement response guidance emphasizes that if a violation is not or will not be corrected within the timeframe for violations of that class, a formal enforcement action must be taken consistent with media program guidance, including required degrees of formality and timeliness.

EPA's enforcement approach for Federal facilities emphasizes the importance of negotiated responses for the correction of violations and schedules formalized through Compliance Agreements or Consent Orders, depending upon program authorities and guidance. Where agreement cannot be reached on all issues in a timely manner, EPA will promptly utilize all available enforcement and dispute resolution mechanisms to effectively resolve areas of disagreement.

This chapter also clarifies that Federal officials are expected to take all available steps to obtain sufficient funds to achieve compliance on the most expeditious schedule possible. While EPA recognizes that the Anti-Deficiency Act places certain limitations on Federal officials' abilities to commit funds which they have not been authorized to spend, they may seek additional funds where needed to correct identified compliance problems.

EPA's enforcement response for Executive Branch agencies differs somewhat from its enforcement against non-Federal parties in that it is purely administrative, and neither provides for civil judicial action nor assessment of civil penalties.[2] This does not apply to enforcement actions taken by States as authorized under various statutes nor to EPA actions directed to non-Federal operators of Federal facilities (e.g., GOCO's). EPA will pursue the full range of its enforcement responses against private operators of Federal facilities in appropriate circumstances. In addition, sanctions may be sought against individual employees of Federal agencies for criminal violations of environmental statutes.

---

[1] The provisions of this Chapter are not applicable to enforcement actions under CERCLA/SARA. Any references to CERCLA/SARA are included for information purposes only.

[2] This limitation does not apply to penalties for violations of Interagency Agreements under Section 120 of the 1986 Superfund Amendments and Reauthorization Act (SARA) pursuant to Sections 109(a)(1)(E) and 122(g) of SARA.

A. OVERALL COMPLIANCE POLICY AND PHILOSOPHY

Enforcement is an essential supplement to the strong public mandate for Federal facilities to comply with Federal, State and local pollution control requirements to the same extent as non-Federal entities. Enforcement reinforces the special sense of public duty to comply that this mandate instills in our Federal officials. It is generally recognized by EPA and the public that compliance promotion activities such as technical assistance and training are not in themselves sufficient to create full compliance nor to provide the necessary incentives for public or private officials to affirmatively prevent and anticipate problems in complying with environmental laws.

Federal agencies must comply with Federal environmental laws in the same manner and degree as non-Federal entities and EPA will utilize the full range of its available enforcement mechanisms to ensure Federal facilities compliance. Federal environmental statutes require that, in most circumstances, facilities of the United States Government comply with Federal, State, and local pollution control requirements to the same extent as non-Federal entities. There are, however, certain limitations and differences in terms of the types of enforcement actions which EPA will take against Federal facilities. Unique considerations and procedures that are applicable when enforcement is undertaken against Federal facilities by EPA are explained in the next section of this Chapter.

Federal and State enforcement officials must adhere to the concept of timely and appropriate enforcement response, which EPA and the States have defined for each program to establish a strong, stable, and predictable national enforcement presence. What this means is that if violators are not returned to compliance within a certain timeframe, through a variety of informal contacts and enforcement responses, timely formal enforcement action is required. Timely and appropriate enforcement response guidance, with its timelines, required degree of formality, sanction and escalation, is deemed essential to achieving high levels of Federal facility compliance.

National guidance issued for each environmental program establishes timelines for key milestones in the enforcement Framework for Implementing State/Federal Enforcement Agreements," which sets forth the Agency's general principles on timely and appropriate enforcement response, and program implementing guidance are summarized in Exhibit VI-1 and Appendix C. This exhibit also includes the criteria for defining what constitutes a formal enforcement response. The principles of timely and appropriate enforcement response apply to the full range of sources regulated under Federal statutes; however, the application of specific timelines and definitions in Exhibit VI-1 is generally directed to the most significant violations in each environmental program. Appendix C contains each of the EPA media programs' definitions for significant noncompliance. Regions and States should also apply these timeframes to other types of violations at Federal facilities to the extent possible with available resources and consistent with media program guidance.

The national timely and appropriate milestones are adapted to specific legal enforcement mechanisms and procedures unique to each State. Agreements which embody these "timely and appropriate" requirements and definitions are reached between EPA Regions and States and committed to writing in State/EPA Enforcement Agreements, discussed more fully in Chapter VII. These agreements may also specifically address other compliance activities and response actions of Federal facilities.

EPA emphasizes negotiation with responsible Federal officials on corrective actions and schedules needed to expeditiously resolve noncompliance situations. EPA will generally use either Compliance Agreements or Consent Orders (depending upon available statutory authorities and media program guidance) as the primary mechanism for formalizing agreements with Federal facilities.

B. EPA RESPONSE TO FEDERAL FACILITIES VIOLATIONS

The Federal enforcement process outlined in this Section is designed to provide a uniform approach to responding to violations at Federal facilities, recognizing that each environmental statute establishes somewhat different enforcement response mechanisms. There are several factors which distinguish EPA's enforcement response to Federal facilities from enforcement at non-Federal facilities and by the States:

(a) EPA has a broad mandate to provide technical assistance and advice to Federal agencies to ensure their compliance, as required under Executive Order 12088 (See detail in Chapter II). However, implementing this mandate will not interfere with the application by EPA (or States) of timely and appropriate enforcement procedures to achieve the most expeditious schedule of compliance.

(b) EPA places emphasis on negotiations with responsible Federal officials in resolving Federal facility noncompliance with enforcement documents issued on consent and signed by both parties. This Strategy also explains how failure to reach agreement in a timely manner will be resolved.

(c) Federal EPA enforcement actions and procedures for resolution of compliance problems differ in certain respects for Federal versus non-Federal facilities:

i. *EPA will not bring civil judicial suit against Executive Branch Agencies* and will rely upon administrative enforcement mechanisms for Federal facilities as outlined in Appendix I. This respects the position of the Department of Justice that civil suits within the Federal establishment lack the constitutionally required "justiciable controversy." (See Appendix H which contains the Justice Department's testimony on this issue at a Congresional oversight hearing in April, 1987).

ii. *EPA generally will not assess civil penalties against Federal facilities* under most environmental statutes.[3] This also is in response to the Justice Department position discussed above as well as Federal District court rulings which have issued conflicting decisions as to whether or not the United States government has clearly and unambiquously waived its soverign immunity for penalties under various environmental statutes.

iii. *EPA will negotiate Compliance Agreements or Consent Orders with Federal agencies* to address violations at Federal facilities. The timeframes for negotiation of Compliance Agreements and Consent Orders are defined by EPA's media specific "timely and appropriate" criteria. Prior to issuing a final Compliance Agreement or Consent Order to a Federal facility, the Federal Agency will be provided an opportunity to meet with EPA to discuss key issues and to sign it on consent prior to the order or agreement becoming final and effective.[4] This approach is also based in part on DOJ's written position which states that "Executive Branch agencies may not sue one another nor may one agency be ordered by another to comply without the prior opportunity to contest the order within the Executive Branch."

---

[3] This limitation does not apply to penalties for violations of Interagency Agreements under Section 120 of the 1986 Superfund Amendments and Reauthorization Act (SARA) pursuant to Sections 109(a)(1)(E) and 122(g) of SARA.

iv. *Additional dispute resolution procedures are provided* in media program guidance to resolve compliance issues through EPA, and if necessary, involve OMB under E.O. 12088 for funding disputes, the Attorney General under E.O. 12146 for legal interpretation and the EPA Administrator under E.O. 12580 for CERCLA/SARA.

v. *Federal facilities, like all public entities, face problems in ensuring that funds are adequate to* meet environmental requirements and remedy noncompliance. The obligation to comply is not altered by such funding considerations; the most expeditious means of achieving compliance and obtaining funds is expected. However, the process for acquiring funds does pose unique considerations which should be taken into account in negotiating compliance schedules as described in Section B.1.f.

B.1 Federal Facilities Compliance Process: Civil Administrative Enforcement Procedures

The Federal facilities compliance process outlines the administrative procedures EPA will follow when responding to civil violations identified at Federal facilities. This process is illustrated in Exhibit VI-2 and discussed below. These procedures apply when civil enforcement responses are directed at facilities of Executive Branch Agencies.

B.1.a Notification of Violation

EPA monitors compliance status and identifies violations at Federal facilities through reviews of source self-monitoring and reporting documents, onsite inspections, and the A-106 process. Once a violation is discovered, EPA makes a determination of noncompliance and takes its initial enforcement response.

EPA's initial enforcement response to an identified violation may vary depending on the type of violation and nature of the violator. Media-specific guidance governs the type of initial response and timeframe for such response. See Appendix I for types of enforcement mechanisms used under each Federal environmental program. When EPA has made its determination that a violation has occurred at a Federal facility, Federal Facilities Coordinators or media program staff may informally notify the facility (e.g., via telephone) prior to issuance of formal written notification. If Federal Facilities Coordinators provide this informal notification, they should first consult with appropriate media program staff. This will provide the Federal facility with some additional time to remedy the identified violation before receiving formal written notification from EPA.

Generally, EPA issues a Notice of Violation (NOV), or other program equivalent as the initial written notice for requiring response to address significant violations. NOVs or program equivalents issued for violations at Federal facilities are similar to those issued for non-Federal violations except that they should not mention civil judicial actions by EPA. At a minimum, NOVs or their program equivalent issued for Federal facilities should:

---

[4] EPA may issue unilateral administrative orders to Federal facilities under Section 106 of SARA following concurrence by the Department of Justice pursuant to Section 4(b)(1) of Executive Order 12580.

- Be issued to base commander or facility director level officials.
- Describe the violation and how it was identified.
- State that the consequences of not meeting the requirements stated in the NOV in a timely manner or responding to EPA by the dates specified will result in the issuance of an order or formal escalation of the enforcement action. Relevant citizen suit provisions of involved statutes may also be cited here.
- Explain that the Federal agency can either submit a written certification that it has corrected the violation if only a short-term "fix" is required or an action plan and schedule for a violation requiring more extensive remedial action. Selection of a date for requiring submission of a certification of compliance or remedial action plan and schedule is dependent on the timely and appropriate timeframes shown for each program in Exhibit VI-1. In certain cases, EPA may also include a schedule, proposed order, or proposed compliance agreement as part of or attached to the NOV. The NOV should also state the number of days EPA will take to respond to the reply.
- Refer to any available alternatives to compliance (e.g., Presidential exemptions or specific legislative relief).
- Offer to schedule a meeting or conference with Federal agency officials who are authorized to sign a Compliance Agreement or Consent Order. These officials must also have the authority to make the necessary budget requests to correct the violation according to the schedule outlined in the Agreement.

The NOV, or program equivalents, should be tailored to address the specific noncompliance situation identified at the facility. Appendix J provides a model for developing an NOV. Copies of all NOVs and other enforcement actions issued by EPA to Federal facilities shall be sent to the involved Headquarters media program enforcement office with a copy to the Office of Federal Activities.

B.1.b Response by Federal Facilities: Certification of Compliance or Remedial Action Plans

Once a facility has received the official notice of violation or program equivalent, it is required to submit either a certification of violation correction, or a remedial action plan (RAP) to EPA. A facility can also dispute EPA's noncompliance finding through appeals as provided for through the dispute resolution process outlined in Section B.1.e.

The certification of violation correction will consist of a letter from the facility which identifies the violation and describes remedial action taken. It is accompanied by support documentation that demonstrates achievement of compliance. When remedial actions needed to correct the violation will exceed the timeframes for timely and appropriate enforcement response for either achieving compliance or being subject to formal enforcement response, the facility must submit a remedial action plan. The plan should:

- Describe the noncompliance situation;

- Identify the corrective actions to be taken;
- Outline the schedule for implementing the remedial actions; and
- Describe the content and frequency of progress reports.

EPA will acknowledge the receipt of the proposed certifications and remedial action plans with a written response. An example of such a Response Form is provided in Appendix J. A response should be worded so the facility is not insulated from further EPA or State enforcement action. The response should also specify a date by which EPA will respond which should normally be within 30 days. In complex situations, detailed comments may follow thereafter.

Remedial actions and schedules proposed by the Federal facility may serve as a basis for a Compliance Agreement or Consent Order. Although a remedial action plan does not constitute an EPA enforcement response, it may be used as a basis for monitoring future compliance for violations that are not sufficiently significant, as defined in program guidance, to mandate formal enforcement response.

In the event of disputes in instances where formal enforcement response is not necessary, the Region may use the dispute resolution processes described in Section B.1.e to further escalate and resolve compliance.

B.1.c Initial Negotiation of Compliance Agreements or Consent Orders

Where formal enforcement response is required, following the notification of violation, EPA generally will use Compliance Agreements or Consent Orders as the primary formal enforcement response to formalize bilateral agreements between EPA and a Federal agency to ensure expeditious return to compliance. Compliance Agreements will be used as EPA's principal formal enforcement response unless media program guidance indicates that statutory authorities are available for use of Consent Orders for Federal facilities violations. Appendix I indicates the specific enforcement responses in each media program and highlights those which are available for use at Federal facilities. Consent Orders should be used when agreements are negotiated jointly with a State and the State has administrative order authority.

It is EPA policy that Compliance Agreements or Consent Orders should be negotiated within required media-specific, "timely and appropriate" timeframes or EPA may take further formal administrative enforcement action to achieve compliance. EPA will prepare Compliance Agreements or Consent Orders for joint signature by the affected facility and EPA. At a minimum, all Compliance Agreements and Consent Orders should state that the violating facility is accountable for meeting timeframes and taking required actions as outlined in the Agreement or Order or be subject to further enforcement action. In certain cases, it may be necessary to negotiate a two phased agreement or order for the same violation: the first detailing a schedule for studies necessary to correct the problem and the second establishing a plan and schedule for remedying the problems based on the results of the studies. The time schedules included in both may overlap or be concurrent.

Environmental audit provisions will be emphasized in negotiations in instances in which the Federal agency can constructively be directed to correct similar violations which are likely to occur at other related facilities or there appear to be systematic compliance management problems. This is consistent with the July 9, 1986 Policy Statement on Environmental Auditing, 51 FR 25004 (See Appendix D).

Federal Facility Coordinators will assist the media program offices and the Regional Counsel's office in preparing and negotiating Compliance Agreements or Consent Orders with Federal agencies. Appendix J outlines a format to use when developing a Compliance Agreement or Consent Order for a Federal facility. This sample Compliance Agreement incorporates model language developed by the Department of Justice.

EPA media programs may consider including enforceability clauses in Compliance Agreements with Federal facilities which reference the applicable citizen suit provisions of the involved statute. The RCRA program has developed a model "Enforceability Clause" to be included in all RCRA Federal Facility Compliance Agreements. These clauses reference the use of applicable citizen suit provisions by States or citizens for failure to comply with terms or schedules in Compliance Agreements. See Appendix J for a copy of the RCRA Program Enforceability Clause. Certain EPA Media program offices also have developed specific guidance concerning Compliance Agreements. For example, the RCRA program model language for Federal facility Compliance Agreements is contained in the January 25, 1988 memorandum "Enforcement Actions under RCRA and CERCLA at Federal Facilities," which is contained in Appendix K.

- *Timely and Appropriate Response Criteria*

EPA's timely and appropriate enforcement guidance sets forth the criteria for the commencement of an enforcement action at a facility in violation. The negotiation of Compliance agreements and Consent Orders at Federal facilities are subject to EPA's timely and appropriate enforcement response criteria. Based on the type of violation at the facility, this guidance establishes the time it should take to issue the initial enforcement action, the type of enforcement action that should be taken, and the amount of time it should take the facility either to achieve full physical compliance or to enter into a Consent Order or Compliance Agreement which incorporates a schedule for achieving compliance.

If compliance is not achieved or a Compliance Agreement or Consent Order can not be negotiated within required media-specific timeframes, EPA generally will issue a proposed order or proposed compliance agreement prior to escalating its enforcement action using the dispute resolution procedures outlined in Section B.1.e.

Timeframes for issuance of proposed Administrative Orders or Compliance Agreements and their program equivalents will follow media-specific timely and appropriate guidance as shown in Exhibit VI-1.

Informal assistance from OFA and Headquarters media program offices can be used at any point in the process. Regional program offices are encouraged to request OFA assistance through the Federal Facilities Coordinators who will assist them in contacting Federal agency regional operations and commands to resolve compliance problems. OFA and the media program office will work directly with the parent agency's Headquarters office and appropriate EPA Headquarters and Regional legal and compliance program offices to try to resolve the problem.

EPA Regional staff also should successively escalate unresolved issues up to the Deputy Regional Administrator (DRA), to the extent appropriate before taking formal administrative action due to unresolved issues in remedying compliance problems. The DRA may then contact an equivalent level official of the other Federal Agency in an effort to achieve resolution.

B.1.d Issuance of Proposed Consent Orders or Proposed Compliance Agreements

EPA may issue proposed administrative orders or proposed Compliance Agreements at a number of different points in the compliance process in order to expedite the timely resolution of violations by Federal facilities. Proposed orders or compliance agreements generally are issued to Federal facilities when:

- A Federal facility fails to respond by the date(s) specified in a notification of violation or program equivalent.
- A Consent Order or Compliance Agreement cannot be or is not successfully negotiated within the timeframes established in media-specific guidance because of disagreement on proposed remedial actions, the schedule for correcting the violation, or other outstanding issues.
- A Federal facility has violated the terms of a signed Compliance Agreement or Consent Order.
- There is an imminent and substantial endangerment to human health or the environment which necessitates immediate action.

When initial negotiations for a Compliance Agreement or Consent Order to address the violations at a Federal facility exceed the timely and appropriate enforcement response timeframes for resolving violations, EPA shall escalate the enforcement response action by issuing either a proposed administrative order or a proposed Federal Facility Compliance Agreement to the violating Federal facility. EPA's use of either a proposed order or a compliance agreement as the formal enforcement mechanism for Federal facility violations is dependent upon both the scope of EPA's administrative order authority under each of the environmental statutes and media program-specific enforcement guidance on the appropriate use of Consent Orders vs. Compliance Agreements at Federal facilities. Appendix I contains a statute-by-statute summary of EPA's administrative enforcement response authorities for Federal facility violations. Since there are certain procedural differences when using orders vs. compliance agreements at Federal facilities, these two mechanisms are discussed separately as follows:

- *Compliance Agreements*

Where agreement has not been reached within the media program's timeframes for formal enforcement action, EPA generally will issue a proposed compliance agreement to a Federal facility and allow a specified period of time, usually 30 days, for the Federal agency to respond in writing as to whether it agrees with the terms of the agreement or whether it will seek resolution of disputed issues through EPA dispute resolution process procedures. Upon issuance of the proposed compliance agreement, EPA will notify the Federal facility that failure to either agree to the conditions of the agreement or resolve the remaining issues within 30 days of issuance will trigger the formal dispute resolution process. If at the end of the 30-day period, the Federal agency chooses to accept the proposed compliance agreement, the agreement will become final and effective upon signature by both parties. If the Federal Agency appeals the conditions of the compliance agreement in writing or fails to respond within 30 days, the formal EPA dispute resolution procedures will be initiated. See Section

B.l.e. below which outlines the formal procedures for escalating and resolving disputes between Executive Branch agencies.

- *Consent Orders*

Where EPA has statutory administrative order authority for Federal facilities, and where it is specified in media-program guidance, EPA will issue a proposed administrative order to a Federal facility and allow a specified period of time, generally 30 days, for the Federal agency to respond in writing stating whether it will (a) accept the terms of the proposed order on consent or (b) seek resolution through formal administrative appeals procedures EPA has established for the type of order which was issued (e.g., "Final Administrative Hearing Procedures for RCRA Section 3008 (h) Orders," issued by EPA on February 19, 1987). If the Federal facility chooses to accept the proposed order within the 30-day time period, it will be signed by both parties and become a final consent order.

If the Federal facility fails to take advantage of this opportunity and does not respond to EPA within the 30-day time period specified in the proposed order, the order will become a final administrative order, effective at the time established in the proposed order. It is important to point out that it is incumbent upon the Federal agency to respond to EPA in writing within the timeframe specified in the proposed order (i.e., generally 30 days) or it will become a final administrative order which will foreclose any further opportunity to negotiate and sign an order on consent. This approach is consistent with the Justice Department's position that EPA may not issue Administrative Orders to other Federal agencies "without the prior opportunity to contest the order within the Executive Branch."

When a Federal facility has chosen to appeal a proposed order through EPA's established administrative appeals procedures, it shall be subjected to such proceedings in the same manner and degree as any private party. If a settlement is reached through the use of these appeals procedures, EPA and the involved Federal facility will both sign a final administrative order on consent. If, however, these administrative proceedings have been fully exhausted and agreement cannot be reached on consent, the formal dispute resolution process will be initiated and the dispute will be escalated to EPA Headquarters following the steps outlined in Section B.1.e. The proposed order will be stayed pending escalation and resolution of the dispute.

B.1.e Internal EPA Dispute Resolution Procedures

This strategy sets forth EPA's basic Federal Facilities Dispute Resolution Process as described in detail in Section B.1.f below. There are however, certain existing formal administrative procedures which are applicable to all regulated entities and these will be utilized for Federal facilities in appropriate circumstances. Certain media programs also have issued specific written guidance for resolving disputes at Federal facilities which may be followed consistent with the process outlined in Section B.1.f.below. The types of internal EPA dispute resolution procedures that may be utilized to resolve compliance problems at Federal facilities are:

1) Administrative procedures established for certain specific statutory authorities (e.g., "Final Administrative Hearing Procedures for RCRA Section 3008(h)");

66

2) Media-program specific written guidance for dispute resolution at Federal facilities (e.g., "Elevation Process for Achieving Federal Facility Compliance Under RCRA," March 24, 1988 (See Appendix K)); or

3) EPA's Federal Facilities Dispute Resolution Process as described below.

If available, established administrative procedures should first be invoked to resolve disputes between Executive Agencies. If there are no existing administrative procedures in place to resolve a conflict at a Federal facility, the Regions should utilize media specific guidance, when available, or the general Federal facilities EPA Dispute Resolution Process outlined below. Media-specific dispute resolution procedures for Federal facilities still follow the general concepts set forth in the EPA Federal Facilities Dispute Resolution Process. However, media-specific guidance may contain certain variations to accommodate media program procedural difference or preferences.

B.1.f Federal Facilities Dispute Resolution Process

The focus of EPA's Federal Facilities Dispute Resolution Process is on cases where EPA and the Federal agency are unable to agree on the conditions, terms or schedules to be contained in a Compliance Agreement or Consent Order. This process is also sometimes utilized for resolving disputes resulting from violations of signed agreements or orders. In addition, certain EPA media programs (e.g., RCRA) have established other dispute resolution procedures for use when a facility has violated the terms of a signed order or agreement as described further in section B.1.f.

EPA will make every effort to resolve noncompliance disputes at the Regional level. However, when EPA and a Federal agency are unable to reach formal agreement in a signed Consent Order or a signed Compliance Agreement, the dispute will be formally referred by the Regional Administrator (RA) to the Assistant Administrator (AA) for the affected media program, the AA for the Office of Enforcement and Compliance Monitoring and the AA for External Affairs as shown in Exhibit VI-2. This joint referral should take place only after the Regional Office has tried to resolve the issue within established timeframes for guiding what constitutes "timely and appropriate" enforcement response (See Exhibit VI-1). In the Federal facility compliance process, the use of internal EPA dispute resolution procedures is the functional equivalent of a referral of civil judicial enforcement actions for prosecution in the sense that it provides a final forum in which disputes may be resolved for Executive Branch Agencies.

A formal referral shall be sent to EPA Headquarters within 60 days after the established media timeframe for formal enforcement action has been exceeded and the Federal facility has failed to sign a proposed order or proposed compliance agreement. If a proposed order has been appealed, EPA's formal administrative appeals procedures should first be exhausted prior to making a formal referral to EPA Headquarters. The referral package should describe the identified violation, provide a historical summary of the communications and negotiations with the facility, identify enforcement actions taken (including any State or citizen actions), identify the unresolved issues and include appropriate support data, with documentation similar to a litigation report. The referral package must be signed by the EPA Regional Administrator.

The Office of Federal Activities, or the lead media program office, will notify the RA in writing when Headquarters receives the referral package and also will report to the Region informally on a monthly basis and quarterly on a formal basis the status of those facilities formally referred to Headquarters. The involved EPA Headquarters media program office, with assistance from OFA and OECM, will attempt to negotiate an acceptable solution with the parent Federal agency Headquarters office within a maximum of 90 days of the referral to EPA Headquarters. At the conclusion of this ninety-day period, if these negotiations are unsuccessful, the Assistant EPA Administrator for the affected media program will refer the dispute to the Administrator for resolution.

The EPA Administrator has primary responsibility for resolving environmental disputes between Executive Branch agencies. The EPA Administrator will consult with the head official of the parent Federal agency and make every effort to reach agreement on an acceptable solution to the problem. If the EPA Administrator determines that there are remaining issues that cannot be resolved, the Administrator may exercise his authority to invoke the procedures afforded by Executive Order 12088 or Executive Order 12146 and involve either OMB or DOJ, respectively, in resolution of the dispute.

B.1.g Use of Executive Order 12088 - Federal Compliance with Pollution Control Standards

Section 1-602 of Executive Order 12088 states that "the Administrator shall make every effort to resolve conflicts regarding such violations between Executive agenices." The EPA Administrator may request OMB's involvement particularly in cases where funding or schedules are the primary issues in resolving the dispute. Section 1-603 further clarifies that OMB "shall consider unresolved conflicts at the request of the Administrator." This means that the EPA Administrator is the only Executive Branch official who can formally request OMB resolution of a conflict between Federal agencies under Executive Order 12088. The section further states that in resolving such conflicts OMB "shall seek the Administrator's technological judgment and determination with regard to the applicability of statutes and regulations."

It also is important to point out that Section 1-604 of Executive Order 12088 states that "these conflict resolution procedures are in addition to, not in lieu of, other procedures, including sanctions, for the enforcement of applicable pollution control standards." This provision recognizes that applicable EPA internal dispute resolution procedures shall be utilized prior to Executive Order 12088 being invoked by the EPA Administrator.

B.1.h Use of Executive Order 12146 - Resolution of Interagency Legal Disputes

Executive Order 12146 (Appendix B) provides for the submittal of legal disputes between Federal agencies to the U.S. Attorney General whenever Executive Branch agency heads are unable to resolve such legal disputes. The Executive Order clarifies that an interagency "legal dispute" would include "the question of which [agency] has jurisdiction to administer a particular program or to regulate a particular activity." In addition, Section 1-402 of Executive Order 12146 specifically states that:

> "Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere."

This means that while the EPA Administrator may invoke E.O. 12088 for Federal facility disputes related primarily to funding and scheduling issues, he may invoke Executive Order 12146 in cases involving legal disputes. Therefore, for Federal agency legal disputes the EPA will utilize its internal dispute resolution procedures prior to invoking E.O. 12146 as outlined above. When a legal dispute cannot be resolved between the EPA Administrator and the involved Agency head, the EPA Adminstrator may request the involvement of the Justice Department in resolving the dispute as outlined in E.O. 12146. Another significant difference between the E.O. 12088 and the E.O. 12146 dispute resolution procedures is that, unlike E.O. 12088, referral of disputes to the Attorney General is not limited to EPA, i.e., either Federal agency or both that are involved in a legal dispute may submit the case to the Justice Department.

B.1.i Use of Other Dispute Resolution Procedures for Violations of Signed Agreements or Consent Orders

The internal dispute resolution procedures outlined above are used primarily to resolve disputes which arise prior to the finalization of a signed Compliance Agreement or Consent Order (e.g., the involved parties cannot agree on the terms, conditions or schedules in the order or agreement). However, there are also situations where disputes occur when a Federal facility violates the terms of a Compliance Agreement or Consent Order which has already been signed by both EPA and the involved agency. In such cases, other dispute resolution procedures may be utilized if EPA and the Federal facility had previously agreed to use other means of resolving disputes that arise in the context of signed agreements or consent orders. For example, the RCRA program has developed this type of dispute resolution process as outlined in their January 25, 1988 guidance memorandum "Enforcement Actions Under RCRA and CERCLA at Federal Facilities" (See Appendix K). The primary differences between these procedures and what is provided for in the Federal Facilities Dispute Resolution Process (Section B.1.f.) are different timeframes and establishment of the EPA Administrator as the final arbiter for disputes resulting from violations of signed agreements.

In addition, the use of alternative dispute resolution (ADR) procedures, i.e., employing neutrals such as mediators, fact-finders, or arbitrators, may be very helpful in resolving compliance problems and disputes at a Federal facility (See the Administrator's Guidance on the Use of Alternative Dispute Resolution in EPA Enforcement Cases, dated August 14, 1987).

B.1.j Impact of Funds Availability on Achieving Compliance and Negotiating Compliance Schedules

The Federal environmental statutes generally require that Federal facilities must comply with pollution control requirements to the same extent as non-Federal entities. The obligation of a Federal facility to comply is not solely contingent upon the availiability of existing funds. In fact, Executive Order 12088 states that, "the head of each Executive Branch agency shall ensure that sufficient funds for compliance with applicable pollution control standards are requested in the agency budget." Specific exemptions under the statutes discussed in Section B.1.k. do provide a highly limited exception where the President has specifically requested an appropriation as part of the budgetary process and the Congress failed to make available such requested appropriation (See RCRA §6001, CAA §118, CWA §313).

Federal facilities are expected to seek all possible means of funding to achieve environmental compliance. While the A-106 pollution abatement process is the primary vehicle which Federal agencies use to plan for environmental projects, it is not the only funding related mechanism available. Many compliance problems may not require large capital expenditures, e.g., operation and maintenance (O&M) activities, and Federal agencies are expected to use all available existing funds to return to compliance in such circumstances. Some Federal agencies have O&M accounts or capital accounts for building and construction funding, which can serve as a source of funds. If a compliance problem does require significant capital expenditures, the agency can consider reprogramming funds, transfer authority, or requesting a supplemental appropriation, which will enable an agency to receive funds in the year in which they are needed.

During negotiations on Compliance Agreements and Consent Orders, Federal officials will be expected to offer the most expeditious means of funding required remedial action(s). However, EPA recognizes that the Anti-Deficiency Act (31 U.S.C. §1341) prohibits Federal officials from commiting funds beyond those they are authorized to spend. Therefore, the language in the model Compliance Agreement in Appendix J simply commits the Federal official to seek any additional necessary funding where existing funds are unavailable to correct identified compliance problems. Additional appropriations should be sought only where it has been determined that existing agency funds are either unavailable or inadequate to address the violations. The Federal official signing a Compliance Agreement or Consent Order should have the authority to obligate the funds or make the necessary budget requests to expeditiously correct the violation according to the schedule outlined in the Agreement or Order.

Section 1-602 of E.O. 12088 provides the opportunity for OMB to consider such alternate sources of compliance funding as reprogramming or environmental accounts and should be used by Federal agencies to ensure that all possible avenues of securing necessary funds are exhausted.

B.1.k Exemptions

As directed by Section 1-703 of E.0. 12088, EPA can advise the President on recommendations made by Federal agencies concerning exemptions of facilities from compliance with applicable environmental regulations. Exemptions may be granted only where such exemptions are necessary in the interest of national security or in the paramount interest of the United States. Additional requirements are imposed in particular environmental statutes, e.g., in some, such an exemption is authorized for one year and may be renewed, if necessary. In addition, as noted in Section B.1.e, exemptions may only be granted for lack of funds if the President specifically requests such funds from Congress and they are denied. Section B of Chapter II summarizes the provisions of each of the statutes which provide for such exemptions. It should be noted that while such exemptions are provided for in the statutes, they have been rarely, if ever, invoked to date, and it is not anticipated that there will be any increase in the request or granting of exemptions in the future.

The Regional office will assist any Federal facility which believes it cannot comply with pollution control requirements in finding ways to achieve compliance. Every effort will be made to negotiate an alternative to an exemption which is acceptable to the parent Federal agency, EPA, and State and local pollution control agencies.

If a Federal agency recommends that a facility receive an exemption, the EPA Regional office will provide OFA, the Headquarters media enforcement office and OECM with documentation of the problem so that EPA can establish a position on the exemption. The Regional office should also submit its analysis of the pros and cons of granting such an exemption. The analysis should include the positions of any affected States. OFA will then submit a recommended position for the Administrator to submit to OMB with the views of all affected offices within EPA.

If an exemption is granted to a Federal facility, EPA will provide assistance to the facility in order to correct the pollution problem as expeditiously as possible. The objective is to bring the facility into compliance prior to the expiration of the exemption to preclude the need for a renewal. A copy of the exemption will be sent to any affected States.

B.2 Enforcement Actions For Violations at Federal Facilities Directed at Non-Federal Parties

This section outlines EPA's enforcement approach for addressing violations at Federal facilities which are operated by private contractors or other non-Federal parties, which generally are subject to the full range of EPA's civil judicial and administrative enforcement authorities.

B.2.a Limitation on Civil Judicial Enforcement Actions Applies Only to Executive Branch Agencies

Although EPA will not bring civil judicial enforcement action or assess civil penalties under most statutes against other Executive Branch Departments and Agencies, EPA intends to exercise its full authority to bring civil suits and assess civil penalties, as appropriate, against parties that are not subject to this constraint.

B.2.b Contractor and Other Private Party Arrangements Involving Federal Facilities

Most environmental statutes authorize enforcement response to be pursued against either facility owners, operators or both to correct violations of environmental law. There are numerous Federal facilities and public lands which have some level of private party or non-Federal government involvement in their operation or use. In its April 28, 1987 Congressional testimony the Department of Justice stated that EPA has the authority to take enforcement action against private contractors at Federal facilities (See Appendix H). There may be cases where it will be more appropriate to direct enforcement responses to these other parties, or to both the non-Federal party and the Federal agency depending on the nature of the non-Federal involvement, the language of the involved environmental statute or other factors. This issue arises frequently at government-owned, contractor-operated Federal facilities, commonly known as GOCO facilities.

- *EPA Enforcement Response Policy at GOCO Facilities*

EPA's initial enforcement response at GOCO facilities is influenced by a number of factors including: the statutory language as to who can be held responsible, (i.e., providing that enforcement can be directed at the owner, operator or both); decisions made by State and EPA officials in deciding who the permit holder should be in the case of permit violations; established contractual arrangements; the nature and type of violation(s); and other factors which may determine where enforcement response will yield the most expeditious return to compliance and deterrence for future violations. In this regard, it is EPA policy to pursue the full range of its enforcement authorities against contractor operators of government-owned facilities in appropriate circumstances. EPA also may take enforcement actions against Federal agencies at GOCO facilities following the procedures outlined earlier in this chapter. In certain situations, it may be appropriate to pursue enforcement actions against both the private contractor and the involved Federal agency.

71

As a follow-up to this strategy, EPA will be developing an Agencywide GOCO Enforcement Strategy which will provide more detailed criteria and factors to be considered in determining which party or parties to pursue enforcement action against. This strategy shall also address the extent to which there are certain Federal agency-specific circumstances which could affect to whom EPA's initial enforcement response should be directed.

Exhibit VI-3 provides definitions of the various types of facilities and lands with Federal involvement. This exhibit designates which party EPA generally will direct its initial enforcement response against when violations are identified (i.e., either the Federal agency or the involved private party). Given the complex mix of public and private ownership, operation, and use of the term "Federal facilities," the guidelines in Exhibit VI-3 should help EPA to eliminate delays in taking initial action to return violators to compliance.

It is important to note that this approach focuses only on the party at which EPA's "initial enforcement response" will be directed. Following this initial response, EPA's review of additional information and possible discussions with each party may affect against which party any further enforcement action should be taken, if such further action is necessary. In addition, EPA's enforcement response against either or both parties does not limit or otherwise restrict any future determination of their possible joint or several liability in cases involving CERCLA or RCRA cleanup actions. Simultaneous enforcement actions against both the Federal agency and the contractor should be considered if this would facilitate resolution of the compliance problem.

- *Notification Procedures for GOCO Enforcement Actions*

When EPA has determined which party it will pursue enforcement action against, EPA will make every effort to notify (through, at a minimum, a formal copy (cc) of the enforcement action) other involved parties of the action being taken against either the Federal facility or the contractor. This is important not only to enhance effective communication but also to assist in bringing about expeditious compliance and remedying the violation as soon as possible.

When EPA determines that its initial enforcement response will be directed at the contractor, EPA will take enforcement action appropriate for private parties. This will usually be an NOV, administrative complaint or the program equivalent (depending on the nature of the violation and the media program guidance) to the contractor explicitly stating that they are primarily or individually responsible for correcting the violation in a timely manner and for responding directly to EPA by the date specified. The limitations on civil judicial enforcement and on the imposition of penalties that is applicable to enforcement actions against Federal Executive Branch Agencies, are not applicable to enforcement actions taken against non-Federal parties. Where the notice or complaint is sent to the contractor, it also will state that the involved Federal agency has been simultaneously notified of the action being taken against the contractor. A copy (cc) of the action taken against the contractor should not only inform the Agency of the enforcement action being taken against the contractor but also include a notice which emphasizes the importance of their responsibility to effectively oversee their contractor to ensure compliance (See Appendix J). It should also request the Agency's complete cooperation in working with the contractor to correct the violation and return the facility to compliance as quickly as possible. In circumstances where Federal funding is required to correct the violation, the approach and considerations described in Section B.1.j. are applicable and will be considered in any agreements reached on expeditious compliance schedules.

When EPA determines that its initial response should be directed at the involved Federal facility, EPA will send, where appropriate, an NOV or the program equivalent to the Federal facility stating that they are responsible for correcting the violation in a timely manner and for responding to EPA by the date specified. A copy of the notice will be sent simultaneously to the involved contractor.

B.2.c Contractor Listing

The regulations at 40 CFR Part 15 establish the contractor listing program in which facilities that violate Clean Air or Clean Water Act standards may be put on a List of Violating Facilities. Any facility on the List is ineligible to receive any non-exempt Federal government contract, grant, or loan, or other assistance. Contractors operating Federal facilities are not exempt from being placed on the List.

Such listing is mandatory where a violation at a facility gives rise to a criminal conviction under § 113(c) of the CAA or § 309(c) of the CWA. It is EPA policy to initiate discretionary listing actions against recalcitrant contractors who are operating Federal facilities in a manner which causes continuing or recurring violations of the CAA or the CWA. Under the regulations, EPA may initiate a discretionary listing action against a facility only if the facility is already the subject of requisite EPA or State enforcement action against the contractor. The policies and procedures for the contractor listing program are described in guidance issued by OECM "Implementation of Mandatory Contractor Listing," August 8, 1984; "Implementation of Discretionary Listing Authority," July 18, 1984; and "Contractor Listing Protocols," October 1987.

B.3 Criminal Enforcement Actions at Federal Facilities

In situations where employees of Federal agencies have committed criminal violations of environmental statutes applicable criminal sanctions may be sought against such individuals, in the same manner as is done with respect to employees of other types of regulated entities. Such criminal violations will be addressed in accordance with the investigative policies and procedures of the EPA/NEIC Office of Criminal Investigations and the Agency's criminal enforcement priorities set by the Office of Enforcement and Compliance Monitoring.

B.4 Press Releases for EPA Enforcement Actions at Federal Facilities

It is the policy of EPA to use the publicity of enforcement activities as a key element of the Agency's program to promote compliance and to deter noncompliance with environmental laws and regulations. Publicizing EPA enforcement actions on an active and timely basis informs both the public and the regulated community of EPA's efforts to ensure compliance and take enforcement actions at Federal facilities. The issuance of press releases in appropriate circumstances can be a particularly effective tool for expediting timely compliance at violating Federal facilities.

Consistent with EPA November 21, 1985, "Policy on Publicizing Enforcement Actions, " (Appendix L) the strategy for EPA press releases on enforcement actions at Federal facilities is as follows:

- Press releases generally will be issued for major enforcement actions such as:

73

- Significant Compliance Agreements or Consent Orders signed by both parties (and approvals of major RAPs where Compliance Agreements are unnecessary).
- Referral of disputes to EPA Headquarters when agreement cannot be reached at the Regional level.
- Proposed contractor listings and the administrative decision to list.

All press releases should be done as a part of communications strategy which will be developed for all EPA enforcement actions involving Federal facilities consistent with EPA Order No. 1510.1 "Communication Strategy Document Development" issued April 7, 1987 and transmitted by memorandum from the Administrator to all EPA Senior Managers on June 24, 1987. This order states that "Communication Strategy Documents will be developed for all major actions by the appropriate AA or RA." "Enforcement Actions" are included in the definition of Agency actions covered by the Order (See section 5 of EPA Order 1510.1). At a minimum, these communication strategies should include provisions for notifications to OEA and affected Headquarters program offices as well as a senior ranking official at the affected Federal facility or agency.

EPA's decision to issue a press release and the contents of press releases are not negotiable with Federal agencies or other regulated entities. The publicity of enforcement actions against Federal facilities must be consistent with EPA's "Policy On Publicizing Enforcement Actions" (GM-46) jointly issued on November 21, 1985 by the Office of Enforcement and Compliance Monitoring and the Office of External Affairs; in addition, in the case of criminal enforcement actions such publicity must be in accordance with the EPA guidance memorandum (GM-55) "Media Relations on Matters Pertaining to EPA's Criminal Enforcement Program" jointly issued by the Office of Enforcement and Compliance Monitoring and the Office of External Affairs on December 12, 1986.

B.5 Monitoring Compliance

The EPA Regional office is responsible for monitoring a Federal facility's compliance with any remedial actions and associated schedules which have been agreed to in formal EPA enforcement actions. Such Compliance Agreements or Consent Orders between EPA and Federal facilities are tracked in the EPA Consent Decree Tracking System maintained by the Office of Enforcement and Compliance Monitoring. Regional Federal Facilities Coordinators in cooperation with the regional program offices, must closely review A-106 submissions against all Compliance Agreements, Consent Orders, approved remedial action plans or consent decrees to ensure that projects and corrective actions agreed to are being requested as scheduled. Compliance monitoring and the A-106 process are further addressed in Chapter V.

EXHIBIT VI-1

TIMELY AND APPROPRIATE ENFORCEMENT RESPONSE MATRIX

Policy Framework [1]	NPDES[2]	Drinking Water[3]	UIC[4]	AIR[5]	RCRA[6]	FIFRA[6]
National programs must establish benchmark or milestones for what constitutes timely and appropriate enforcement cases toward ultimate resolution and full physical compliance. In designing oversight criteria for timely enforcement response, each program will attempt to capture the following concepts:	Yes	Yes	Yes	Yes	Yes	Yes--1/5/83 Interpretative Rule re State Primacy for use violations which deal only with instances where EPA refers violations to State, not with violations discovered by States.
1. A set number of days from detection of violation to	Date of violation is when agency learns about violation Required to screen all DMRs within 30 days of receipt. By the time a permittee appears on the QNCR, informal or formal enforcement actions should have been initiated.	Clock starts after State is considered to have "discovered" an SNC (within 2 months after the end of each reporting period).	Clock starts 30 days after date of insp. or receipt of self-monitoring report. The SNC should be resolved by the end of the quarter in which the SNC first appears.	Clock starts 30 days after date of inspection or receipt of a source self-monitoring report which first identifies the violation. By day 45 source should be notified by State of the violation.	Clock starts when case development staff determines a violation has occurred through review of inspection report and/or other data (for tracking purposes, fixed at 45 days after inspection. Initial enforcement response for Class I violators is an NOV within 30 days of discovery. For High Priority Violators there is no initial informal action--the initial action is formal,	Clock starts when EPA refers significant violators to State. State has 30 days to initiate an investigation (can obtain extensions based on circumstances).

---

1. "Policy Framework for State/EPA Enforcement Agreements" August 25, 1986.
2. "FY 1987 National Guidance for Oversight of NPDES Program" April 18, 1986.
3. "Guidance for FY 1987 PWSS Enforcement Agreements," August 1986, "PWSS Compliance Strategy," April 1, 1987, and "Definitions of Timely and Appropriate Action and Significant Non-Compliance," August 27, 1987.
4. "UIC-Program Guidance #53," December 1986 and "UIC Compliance Strategy," March 31, 1987.
5. "Timely and Appropriate Enforcement Response Guidance" April 11, 1986.
6. "Enforcement Response Policy" December 21, 1984.
7. Interprative Rule - FIFRA State Primacy Enforcement Responsibilities, 40 CFR Part 173, Jan. 15, 1983.

EXHIBIT VI-1 (continued)

TIMELY AND APPROPRIATE ENFORCEMENT RESPONSE MATRIX

Policy Framework	NPDES	Drinking Water	UIC	AIR	RCRA	FIFRA
2. Over a specific period of time, a full range of enforcement tools may be used to try to achieve compliance.	Discussed full range of informal, formal, administrative, and judicial enforcement tools.[9]	Discusses full range of informal, formal, administrative and judicial enforcement tools.[10]	Discusses full range of informal, formal, administrative, and judicial enforcement tools.	Focuses on formal enforcement but implies use of informal tools. EPA may develop case at day 90 and will normally issue NOV at day 120 if violation is still unresolved.	Allows for full range of enforcement responses for Class I & II violations.	Interpretive rule focuses on formal enforcement action.
3. A prescribed number of days from initial action within which a determination should generally be made that either compliance has been achieved or an administrative enforcement action has been taken which meets minimum formal requirements, or judicial referral is initiated as appropriate.[8]	Prior to appearing on a 2d QNCR for the same violation (generally w/i 60 days of the 1st QNCR identifying the SNC) permittee must be in compliance or formal enforcement action must be taken. (p. 30) Permittees that are still in violation on the 2d QNCR, go on Exceptions List which is part of SPMS system.	Prior to appearing on a 2d quarterly report for the same violation, source must be in compliance, on an enforceable compliance schedule, or formal enforcement action must be taken.	Prior to appearing on a 2d quarterly report for the same violation, source must be in compliance, on an enforceable schedule or formal enforcement action must be taken.	By day 120, source must be either in compliance or on an administrative or judicial order, subject to referral, or subject to proposed SIP revision that is likely to be approved and is scheduled for State hearing.	High Priority Violators must commence with formal enforcement within 90 days of discovery. For medium priority violator, if compliance is not achieved w/i 90 days after the violation discovery, a decision to escalate is made.	After the investigation is completed States have 30 days to commence the enforcement action.

---

8. Formal enforcement action defined in Policy Framework as having, at a minimum, the following elements:
   - Explicitly requires recipient to take some corrective/remedial action, or refrain from certain behavior, to achieve or maintain compliance;
   - Explicitly is baed on the issuing agency's determination that a violation has occurred;
   - Requires specific corrective action, or specifies a desired result that may be accomplished as the recipient chooses, and specifies a timetable for completion;
   - May impose requirements in addition to ones relating directly to correction, e.g., specific monitoring, planning, or reporting requirements; and
   - Contains requirements that are independently enforceable without having to prove original violation and subjects the person to adverse legal consequences for noncompliance.

9. See "Enforcement Management System Guide" issued 2/27/86 by AA for Water for Enforcement Response Guide.

10. See "Safe Drinking Water Act Public Water System Settlements" - Interim Guidance" issued 11/17/83 by AA for OECM.

EXHIBIT VI-1 (continued)

TIMELY AND APPROPRIATE ENFORCEMENT RESPONSE MATRIX

Policy Framework	NPDES	Drinking Water	UIC	AIR	RCRA	FIFRA
4. Follow-Up and Escalation: A specific point at which a determination is made either that final physical compliance has been achieved or that escalation to a judicial enforcement action should be taken if such actions have not already been initiated.	Guidance establishes goal that cases should proceed from referral to filing in 60-90 days. SNC lists track until compliance is achieved. PCS tracks compliance w/ AOs. Consent Decree tracking follows milestones until compliance is achieved.	SNC lists track until appropriate action is taken or system returns to compliance without an enforcement action. Consent decree tracking follows milestones until compliance is achieved. PWSS AO tracking system will track milestones in federal AOs.	SNC lists track until compliance is achieved. Consent Decree tracking follows milestones until compliance is achieved.	CDS tracks status of compliance with schedule until physical compliance is achieved. Consent Decree tracking follows milestones until compliance is achieved.	SNC lists track until compliance is achieved. Consent Decree tracking follows milestones until compliance is achieved. See 3/24/88 OSWER memo on Elevation Process for Achieving Compliance at Fed. Facilities.	Interpretive rule has criteria for referring significant cases. Consent Decree tracking follows milestones until compliance is achieved for all cases.
5. Final physical compliance date is firmly established and required of the facility.	Enforcement case-specific	Enforcement case-specific	Enforcement case-specific	Enforcement case-specific	Enforcement case-specific	Enforcement case-specific
6. Expeditious physical compliance is required.	Violator is returned to compliance as expeditiously as possible	No specific language.	No specific language	Expeditious compliance implicit in guidance.	Expeditious compliance required.	Intepretive rule covers significant violations that EPA refers to States
7. Scope of Coverage: At a minimum, significant noncompliers are to be addressed. Expansions to larger universe to be considered at later date.	SNC who are major permittees	SNCs as defined for MCL, M/R and chem/rad violations.	SNCs as defined and applied to all well classes.	The following classes of SNC: Class A SIP violators in nonattainment areas in violation for pollutant for which area is in nonattainment, NSPS violators and sources operating in violation of Part C& D permit requirements; and NESHAP violators.	Applies to High Priority Violators and medium priority violators	Not appropriate

EXHIBIT VI-2
FEDERAL FACILITIES ENFORCEMENT RESPONSE PROCESS

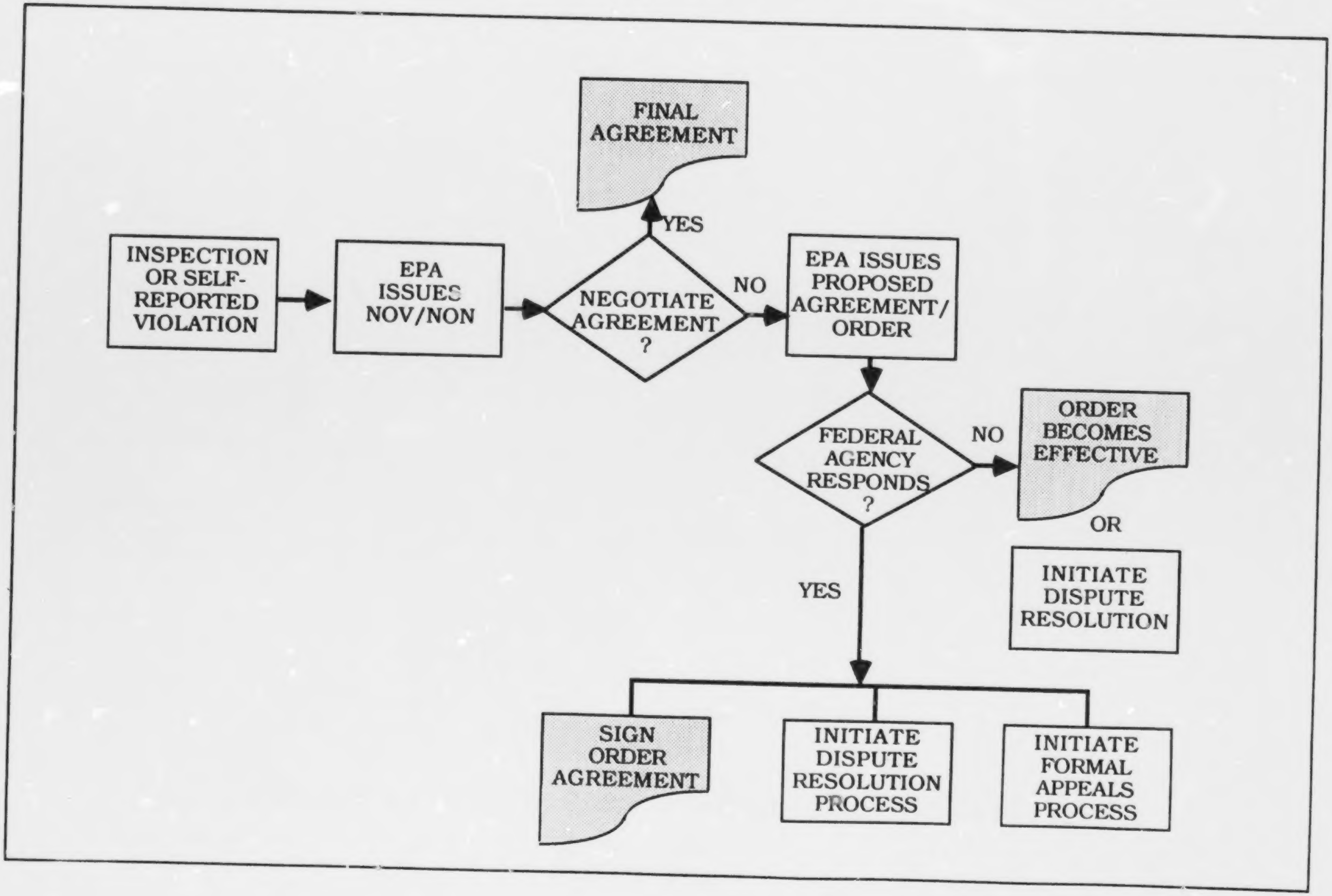

INSPECTION OR SELF-REPORTED VIOLATION
EPA ISSUES NOV/NON
NEGOTIATE AGREEMENT ?
YES
FINAL AGREEMENT
NO
EPA ISSUES PROPOSED AGREEMENT/ ORDER
FEDERAL AGENCY RESPONDS ?
NO
ORDER BECOMES EFFECTIVE
OR
INITIATE DISPUTE RESOLUTION
YES
SIGN ORDER AGREEMENT
INITIATE DISPUTE RESOLUTION PROCESS
INITIATE FORMAL APPEALS PROCESS

EXHIBIT VI-2
(Continued)

FEDERAL FACILITIES DISPUTE RESOLUTION PROCESS

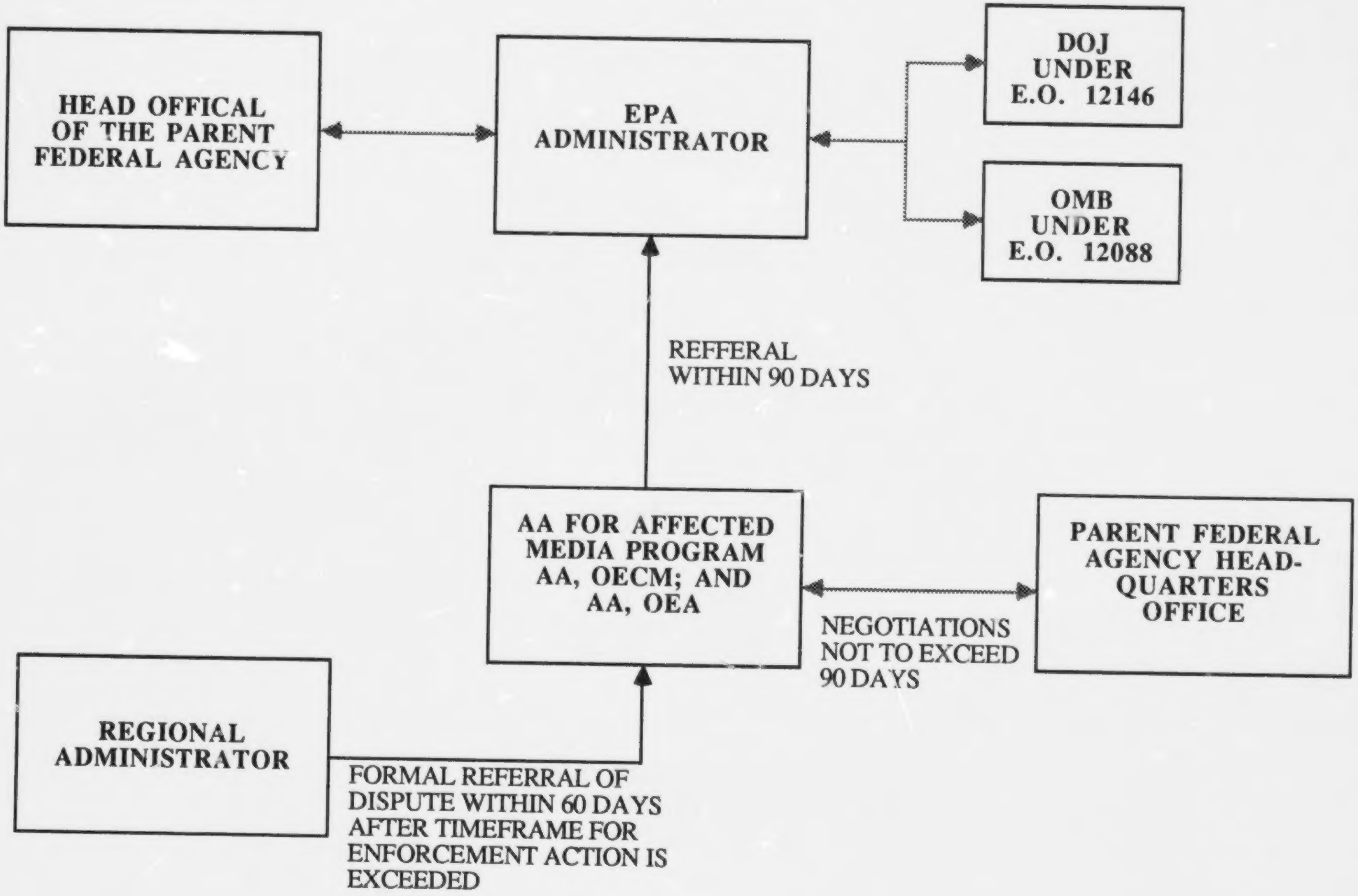

HEAD OFFICAL OF THE PARENT FEDERAL AGENCY
EPA ADMINISTRATOR
DOJ UNDER E.O. 12146
OMB UNDER E.O. 12088
REFFERAL WITHIN 90 DAYS
AA FOR AFFECTED MEDIA PROGRAM AA, OECM; AND AA, OEA
PARENT FEDERAL AGENCY HEAD-QUARTERS OFFICE
NEGOTIATIONS NOT TO EXCEED 90 DAYS
REGIONAL ADMINISTRATOR
FORMAL REFERRAL OF DISPUTE WITHIN 60 DAYS AFTER TIMEFRAME FOR ENFORCEMENT ACTION IS EXCEEDED

EXHIBIT VI-3

EPA INITIAL ENFORCEMENT RESPONSE TO VIOLATIONS AT FACILITIES WITH FEDERAL INVOLVEMENT

Acronym/ Term	Definition	Exception or Other Comment	Initial Enforcement Response Directed at:
GOGO:	Government owned/government operated facility is the traditional Federal facility where the government owns and operates all regulated activity.		FEDERAL FACILITY
PERMITTEE:	Parties granted a permit for short-term use of government land (special use permit holders).		
WITHDRAWAL FROM PUBLIC USE:	Permit granted to a Federal agency or instrument of the Federal government to use the land of another Federal agency for up to twenty years, under the Federal Land Policy and Management Act, as long as the intended use does not involve destruction of the land (e.g. military uses and dams).	If administering the lands when the violation occurred.	
GOCO:	Government owned/contractor operated facility is owned by a Federal agency but all or portions of it are operated by private contractor(s).	Except if dictated by statute or other factors. Action may also be against both parties.	FEDERAL FACILITY OR PRIVATE PARTY
JOCO:	Jointly owned/contractor operated is a facility where a portion is owned by the Federal agency and a portion is owned by a private operator which operates the entire facility and produces some goods and services for the Federal agency and some for its own use or profit.		
GOPO:	Government owned/privately operated is a facility where the government has leased all or part of its facility to a private operator for their operation and profit.		
COCO:	Contractor owned/contractor operated facility is a non-government owned, privately operated facility that provides goods and/or services to a Federal agency under contract.		PRIVATE PARTY
COCO(E):	Same as COCO, however, contractor may be furnished government equipment to manufacture a product or provide a service.	Except if pollution abatement is to be paid by the Federal facility for the furnished equipment.	
POGO:	Privately owned/government operated is a facility where the government leases buildings or space for its operations.	Except if violation resulted because of Federal agency operation.	
LEASEE:	Parties granted use of government land by a rental agreement or a title transfer with a revisionary clause (municipal landfills, oil and gas, mining, grazing, agricultural and industrial operations).	Or non-Federal parties.	
GRANTEE:	Parties having received a grant for permanent authorization to use government land or given right of way. Grants usually involve a single payment for the land or transfer of land use rights.	Or non-Federal parties.	
CLAIMANT:	Parties that have properly located, recorded, and maintained mining claims on the public domain under the 1872 mining law (and who) have a possessory right against the U.S. and third parties.		
PATENT HOLDER:	A mining claimant who has met the statutory requirements of the 1872 mining law and has been issued a patent.		
HOLDER:	Any applicant who has received a special use authorization (for the use of National Forest land) from 36 CFR 251.51.		

CHAPTER VII

ROLE OF THE STATES IN RESPONDING TO FEDERAL FACILITIES VIOLATIONS

VII. ROLE OF THE STATES IN RESPONDING TO FEDERAL FACILITIES VIOLATIONS

The purpose of this Chapter is to clarify the role of the States in responding to Federal facilities violations and to highlight several aspects of the State/EPA relationship that will be spelled out in the State/EPA Enforcement Agreements. This Chapter should be read in conjunction with Chapter VI, which sets forth the basic approach and procedures EPA and delegated or approved States will use when responding to violations of Federal law at Federal facilities.

A. STATE RESPONSE TO FEDERAL FACILITIES VIOLATIONS

States with delegated or authorized Federal programs have primary responsibility for responding to violations at Federal facilities under most of the environmental statutes with a few exceptions such as toxic chemical controls under TSCA, and enforcement of certain motor vehicle requirements under the Clean Air Act. In addition, as discussed in Chapter II.A of this Strategy most Federal environmental statutes require that Federal facilities must comply with Federal laws and regulations, but also with all applicable State and local environmental requirements to the same extent as non-Federal entities.

EPA retains parallel legal authority and responsibility to enforce Federal law even in delegated or approved States. As a matter of policy, in order to avoid duplication of effort where both EPA and States have parallel enforcement authority, EPA enforcement action in States where programs are delegated or approved only take place when a State: (1) fails to take timely and appropriate action, (2) requests EPA to take the lead or decide that joint enforcement action is appropriate, or (3) in other limited circumstances as outlined in the "Policy Framework for Implementing State/EPA Enforcement Agreements." The remainder of this section highlights the following areas concerning State responses to Federal facility violations:

- The use of State enforcement authorities;
- State enforcement response following EPA inspections in delegated States; and
- The relationship between EPA and State enforcement actions against Federal facilities.

A.1 Use of State Enforcement Authorities

As noted above, most EPA statutes envision that States with adequate authority and capability will assume operating responsibility for environmental programs, including Federal facilities. While the extent of delegation varies from program to program and State to State, the majority of EPA's responsibility for direct program administration on a day-to-day basis including initial obligation for enforcement, has been assigned to the States through delegation or authorization.

States are not subject to the same constraints as EPA regarding enforcement actions against Federal facilities. As a result, States generally may exercise a broader range of authorities and enforcement tools than EPA to address violations at Federal facilities. States should use the full range of their enforcement authorities to address Federal facility violations to the same extent they are used for non-Federal facilities while meeting the requirements of timely and appropriate enforcement response. States are also encouraged, wherever possible, to pursue bilateral, negotiated agreements, or consent orders or decrees as appropriate with Federal facilities or three party (EPA/State/Federal agency) agreements as outlined in Section B.1.c where this would facilitate compliance. EPA will, however, deem acceptable any State enforcement approaches which are at least comparable to EPA's in meeting goals for timely and appropriate enforcement response.

A.2 State Enforcement Response Lead Following EPA Inspection in Delegated States

Even where program authorities are authorized or delegated to States, EPA may conduct inspections of regulated entities, including Federal facilities, for a variety of purposes including State oversight, response to citizen complaints, as part of special enforcement initiatives, or where required by statute (e.g., RCRA Section 3007(c) and (d)). EPA generally provides States with advance notification prior to such inspections and generally invites them to participate.

When violations are identified through such EPA inspections of Federal facilities in delegated States, EPA will immediately contact the State and offer them the first opportunity to pursue timely and appropriate response with the involved Federal facility, consistent with the State's delegated authority. EPA will send the inspection report identifying any violations to the Federal facility simultaneously with EPA's sharing of this information with the State. An up-front mutual decision will then be made between EPA and the responsible State agency as to which of them will take any follow-up action. If a State is unwilling or unable to take action, or fails to take action in a timely manner after initially agreeing to pursue the case, EPA will take direct Federal action after advance consultation and notification of the State pursuant to the State/EPA enforcement agreement.

To the extent possible, arrangements should be made in advance in individual State/EPA Enforcement Agreements on the types of situations involving Federal facilities in which the State would request EPA support or direct action, paying particular attention to these situations in which follow-up is required to EPA inspections. In particular, in the case of a State's use of an EPA inspection as the basis for its own action, EPA and the State should agree on how EPA evidence and expertise will be utilized in taking State enforcement action. How the State uses EPA's inspection report will be up to the State so long as the state's response to any violations identified by EPA's inspection report are addressed in a timely and appropriate manner.

A.3 EPA Involvement in State Enforcement Actions

Because of EPA's ongoing responsibility to provide technical assistance and support to Federal Agencies in achieving compliance, as required under E.O. 12088, EPA may need to be involved in assisting to resolve noncompliance problems even when a State takes the lead in an enforcement action. If either the State or the Federal facility in violation requests EPA's involvement, EPA will participate to the extent determined appropriate by affected Regional program division directors in consultation with the Federal Facility Coordinator. EPA's involvement should focus more on resolving disputes rather than on providing project-level technical assistance to the Federal facility which could conflict with the State's ongoing enforcement proceedings.

As directed in E.O. 12088, EPA has a duty to "make every effort to resolve conflicts regarding such violations between Executive agencies and, *on request of any party*, such conflicts between an Executive agency and a State, interstate or a local agency." However, in each such case, EPA's involvement will respect the perogatives of the State to

83

pursue independent enforcement action and EPA will be careful not to interfere with State enforcement proceedings. EPA will offer both parties its assistance to promote a speedy resolution of identified problems, and communicate fully with both the State agency and affected Federal agency officials of its responses and suggested role consistent with EPA's conflict of interest rules and judicial ethics.

A.4 Relationship of State Administrative and Judicial Citizen Suits to EPA Compliance Agreements

Usually, when EPA pursues a judicial enforcement action against a violator, it serves as a bar to further enforcement action by States or citizen (under citizen suit provisions provided in most of the statutes) for similar action for the same violation. The Federal EPA enforcement process described for Executive Branch Agencies relies heavily on Compliance Agreements, which do not bar State administrative or judicial actions or citizen suits to compel compliance by Federal Agencies. Therefore, when EPA has negotiated a Compliance Agreement, as opposed to issuing an Order on consent, it would not legally affect the rights of non-parties to the Agreement. Despite EPA's belief that in the vast majority of cases Compliance Agreements should be a very effective means of ensuring a prompt return to compliance, there may be circumstances in which States or private citizens choose to exercise their rights to take further enforcement action. EPA encourages such non-parties to the EPA/Federal agency Compliance Agreement to fully consider and use it as a basis for relief sought in their own actions to seek expeditious compliance. It is also for the above reasons that it is desirable for States to sign Compliance Agreements and Consent Orders along with EPA and involved Federal facilities. In addition, EPA compliance agreements may contain enforceability clauses which recognize the rights of states and citizens to enforce these agreements through the citizen suit provisions of the relevant statutes.

B. FEDERAL FACILITIES IN THE STATE/EPA ENFORCEMENT AGREEMENTS PROCESS

State and Federal roles are defined through negotiated multi-year State/EPA Enforcement Agreements, which are reviewed annually on a State-by-State basis for each environmental program. Implementation of these agreements is guided by the EPA "Policy Framework for State/EPA Enforcement Agreements" (issued June 26, 1984, revised and reissued June, 1986), associated national program implementing guidance, and an annual guidance memo on the enforcement agreements process from the Deputy Administrator to the Regions. The purposes of these Agreements are: to establish clear expectations for what constitutes a good State or EPA enforcement program through oversight criteria specified in advance, to establish clear roles and responsibilities for State and Federal enforcement to avoid duplication of effort and use limited resources effectively and efficiently, and to ensure effective national reporting of accomplishments.

The Regions have a great deal of flexibility in determining the form of the agreements and the internal process for handling the agreements. Some Regions have umbrella agreements that include all programs in one comprehensive agreement negotiated between the RA and the State Environmental Commissioner. Other Regions have program-specific agreements with the respective State Agency. To the extent possible, Regions are encouraged to incorporate the enforcement agreement provisions into existing documents, e.g., grants, Memorandum of Understanding's, State/EPA Agreements.

The timing of negotiations/reviews of the agreements depends on the vehicle chosen and the Region or State planning cycle. Regional program staff should consult with the

Federal Facilities Coordinator in the development and negotiation of the Enforcement Agreements.

While most aspects of the Agreements pertain equally to Federal and non-Federal facilities, this Chapter focuses on how Federal facilities should be explicitly addressed in the State/EPA Enforcement Agreements in three of the areas covered in the Policy Framework: clear oversight criteria, criteria for direct Federal action, and advance notification and consultation.

B.1 CLEAR OVERSIGHT CRITERIA AND OVERSIGHT APPROACH

There are seven general criteria mentioned in the Policy Framework and covered in various forms in program guidance:

B.1.a Identification of and Priorities for the Regulated Community

States will be expected to have included Federal facilities in their inventories and program information systems, appropriately identified as such through the use of assigned Federal facility ID numbers. The Federal Facility Coordinator will make the information available to the State on the different types of Federal facilities using the FINDS information system. As part of the enforcement agreements process, EPA Regions and the State will review any special needs for identifying and tracking Federal facilities.

B.1.b Clear and Enforceable Requirements

Requirements established through permits, compliance agreements, administrative orders, and consent decrees should define in enforceable terms a timetable for Federal facility remedial actions. In particular, EPA and the States need to assure that Federal facilities have permits that are current. If there are permitting problems at Federal facilities, Regions and States should develop a strategy for addressing them as part of the annual work plan negotiations process, consistent with national program permitting strategies, where applicable.

B.1.c Accurate and Reliable Compliance Monitoring

EPA and the State will review the planned inspection schedules for the coming year for each program to ensure that Federal facilities are inspected at required frequencies.

EPA will assist in resolving any particular problems of access to facilities that the States may be encountering, including instructions on how to obtain security clearances, where necessary.

B.1.d High or Improving Rates of Continuing Compliance

As part of each media program tracking system, administering agencies should track the progress of returning Federal facility significant violators to compliance. To ensure broad Federal facility compliance, the States may be asked to participate in targeted initiatives in compliance monitoring and enforcement for Federal facilities of specific agencies or by facility type.

B.1.e Timely and Appropriate Enforcement Response

States are responsible for taking timely and appropriate enforcement action, as described in Chapter VI. EPA Regions and States are to reach agreement on adapting national definitions of appropriate enforcement response and timeframes to state-specific authorities and procedures. Regions and States should discuss the enforcement approach the State generally plans to use for responding to Federal facility violations. They should also reach agreement on any differences in procedure that the State plans to use, if any, that are different from those used for non-Federal facilities. For example, the Region and State should discuss any upfront agreements the State wants to make about taking enforcement action based on an EPA inspection (e.g., for statutorily-required EPA inspections of Federal TSD's in RCRA), and agree on how Federal or State evidence and expertise will be used in taking such action.

B.1.f Accurate Recordkeeping and Reporting

In order to support an effective program, administering agencies must have timely, complete, and accurate information on Federal facility compliance status and enforcement actions. States should report Federal facility compliance data as part of each program's reporting measures and commitments (e.g., SPMS and program-specific system). The Regions should also request States to provide different information on Federal facilities compliance status if mutual agreement can be reached as part of the State/EPA enforcement agreements process. EPA is especially interested in receiving copies of State enforcement actions at Federal facilities.

B.2 DIRECT EPA ENFORCEMENT

EPA will take direct Federal action principally where a State is unwilling or unable to take "timely and appropriate" enforcement action, or where the State asks EPA to join in or take enforcement action. To the extent possible, arrangements should be made in advance, as part of the enforcement agreement, concerning the types of situations in which the State would request EPA to take direct enforcement action to address Federal facility violations.

B.3 ADVANCE NOTIFICATION AND CONSULTATION

As part of the agreements process, Regions and States are to agree in writing as to who, how, and when EPA will notify and consult with the State agency in advance of Federal inspections and enforcement actions. Federal facilities may involve a greater or different need for coordination between States and Regions than non-Federal facilities, particularly where the Federal facilities request EPA technical assistance or where EPA is required to conduct an inspection (e.g., under RCRA). Because Federal facilities compliance problems are often of a multi-media nature, it may be appropriate to arrange a single point of contact in a State, statewide or in a particular program, for Federal facility issues.

The advance notification and consultation protocols in the State/EPA Enforcement Agreements should incorporate any of the above-mentioned types of special arrangements necessary for Federal facilities.

The protocols should also address how the State will be involved in the review of Federal agency A-106 submissions, and include plans for an annual review of patterns of compliance problems at Federal facilities in the State.

CHAPTER VIII

EPA ROLES AND RESPONSIBILITIES FOR PROGRAM IMPLEMENTATION

VIII. EPA ROLES AND RESPONSIBILITIES FOR PROGRAM IMPLEMENTATION

The Federal Facilities Compliance Program is a multi-media program requiring close coordination and cooperation among all involved parties. The purpose of this Chapter is to clarify the roles and responsibilities of EPA Headquarters staff and the Regional offices for implementing the Federal facilities program and this Strategy. This Chapter is necessary in order to ensure implementation and integration of all elements of this strategy into the various media programs and EPA's overall internal management systems.

The EPA tasks for ensuring Federal facilities compliance are divided between the Regional offices and Headquarters staff. Coordination among both staffs is necessary to ensure that this Strategy is executed consistent with national and program policies, procedures, and guidance. Therefore, this Chapter has been divided into the following sections:

(1) Regional office staff - This section addresses the roles and responsibilities of the Regional Administrator, Deputy Regional Administrator, Regional Counsel Regional Program Staff/Division Directors, and Regional Federal Facilities Coordinators for implementing various aspects of the Strategy.

(2) Headquarters offices - This section describes the roles and responsibilities of those Headquarters offices that have certain responsibilities for coordinating and working with the Regions on Federal facility activities.

Responsibilities for implementing key strategy features such as identification of the regulated community, technical assistance/ training, compliance monitoring, involvement in the A-106 review process, and participation in the dispute resolution process are described for Headquarters and Regional program offices and staff.

A. REGIONAL OFFICE STAFF

The following section describes the roles and responsibilities of the Regional office staff with regard to the Federal facilities program. See Exhibit VIII-1 at the end of this Chapter for a diagram which depicts these Regional relationships.

A.1 Regional Administrator

The Regional Administrator (RA) ensures that Agency policies and guidance on implementing Executive Orders 12088 and 12146 and the environmental statutes are effectively carried out. The RA is responsible for the level of Federal facility compliance in the Region through encouragement of and support for the Regional staff in their efforts to resolve compliance problems at Federal facilities. The RA will formally refer disputes with other Federal agencies that cannot be resolved at the Regional office level within established media timeframes to the Assistant Administrator (AA) for the affected media program, the AA for External Affairs and the AA for OECM. These referrals will be signed by the Regional Administrator.

A.2 Regional Administrator/Deputy Regional Administrator

The RA or Deputy Regional Administrator (DRA) defines the following based on internal Regional operating procedures consistent with the guidelines in this strategy:

(a) Involvement of Regional Counsels and the role of Program Divisions in the issuance of enforcement actions and negotiations of compliance agreements for Federal facilities;

(b) The process for evaluating inspection schedules for Federal facilities and opportunities for multi-media inspections and the respective roles of the Program Divisions, Environmental Services Divisions (ESD's) and Federal Facilities Coordinators in this process;

(c) Designation of Regional staff responsible for signing Compliance Agreements, NOV's, Consent Orders, etc., for Federal facilities violations;

(d) Assurance that Regional program reviews/audits of delegated State programs include a review of the State's progress in addressing Federal facilities compliance problems and ensuring that Federal Facilities Coordinators are informed and involved in these reviews;

(e) Responsibilities for Regional review of Federal agency A-106 submissions and coordination with States on the A-106 process; and

(f) Assurance that Federal facilities compliance is specifically addressed in State/EPA enforcement agreements.

In appropriate cases where agreement cannot be reached in the negotiation of Compliance Agreements or Consent Orders with Federal facilities, Regional staff should escalate unresolved issues to the RA/DRA for resolution within media specific timely and appropriate timeframes prior to issuance of a proposed Order. The RA/DRA may then choose to contact an equivalent level official at the involved Federal agency to attempt to resolve remaining issues.

A.3 Regional Counsel

Upon request, the Regional Counsel provides legal advice to the RA, the Federal Facilities Coordinator, and the Regional media program staff on:

- Determining the compliance status of Federal facilities;
- Evaluating the sufficiency of data supporting compliance determinations;
- Negotiating agreements on solutions to compliance problems;
- Resolving compliance disputes with Federal facilities; and
- Reviewing draft Compliance Agreements and Consent Orders for their legal sufficiency and consistency with Agency policy.

Each Region should clearly identify the role of the Regional Counsel in the Federal facilities compliance process. It is imperative, however, that the Regional Counsel consult with OECM and Headquarters Office of General Counsel on questions of national significance concerning Federal facilities.

A.4 Regional Program Staff/Division Directors

Each Region is responsible for designating a staff person to serve as the primary point of contact for the Federal Facilities Coordinators to deal with on media-specific Federal facilities compliance issues. This designee also is responsible for the following activities.

Identifying the Regulated Community - Ensure that Federal facilities data in program information systems is maintained through the use of a support identification code for Federal facilities.

Technical Assistance/Training - Assist Federal Facilities Coordinators with their Regional multi-media technical program workshops for Federal facilities in their Region. In addition, provide the Federal Facilities Coordinator and OFA, at the beginning of the fiscal year, with the program's annual training plan and notify the Federal Facilities Coordinator of all program training courses and workshops which will be open to Federal facilities in the Region. On a quarterly basis, notify the Federal Facilities Coordinator of availability of spaces for Federal facilities participants.

On-the-job training opportunities should be considered for officials of other Federal agencies where feasible, in cooperation with Regional Federal Facilities Coordinator.

Compliance Monitoring - Ensure that Federal facilities are receiving the required number of inspections for programs where EPA has the lead. This includes conducting at least the same percentage of program oversight inspections for Federal facilities as is done for other facilities in delegated or approved states. The Regional media-program contact should provide the Regional Federal Facilities Coordinator with copies of all EPA inspection reports of Federal facilities.

State Oversight - Develop and negotiate the State/EPA Enforcement Agreements in consultation with the Federal Facilities Coordinator and ensure that at least the required number of inspections of Federal facilities are being conducted in delegated or authorized States.

The Regional media-contact should ensure that a separate component in the Regional reviews/audits of delegated programs is included on State handling of Federal facilities compliance problems. This insert should be developed in consultation with the Federal Facilities Coordinator.

Responding to Violations - At the beginning of the fiscal year and periodically as required by the program, the Regional media-contact in coordination with the Regional Federal Facilities Coordinator, identifies those Federal facilities in significant noncompliance and following media-program Strategic Planning and Management System (SPMS) requirements, reports program actions against the identified Federal facilities Significant Noncompliers (SNCs) to Headquarters. Also, works with the Federal Facilities Coordinator to establish quarterly targets for Federal facilities inspections.

Following consultation with the Regional Federal Facilities Coordinator, the program offices are responsible for issuing NOV's, Compliance Agreements, and/or Consent Orders, where appropriate, for Federal facilities violations within the time frames established in program-specific timely and appropriate guidance. Program Division Directors have the responsibility for sign-off on Federal facilities NOV's, Compliance Agreements and Consent Orders in most Regions consistent with the delegations of authorities for their respective media. Federal Facilities Coordinators should be notified by Division Directors prior to issuance of any enforcement action to a Federal facility. For any disputes formally referred to Headquarters under the RA's signature, the program offices are responsible for formulating referral packages, in consultation with the Federal Facilities Coordinator.

Where there is contractor or other private party involvement at a Federal facility (e.g., GOCO's), the program office must ensure that other parties receive a copy of any enforcement action sent to any of the involved parties.

Involvement in A-106 Review Process - Another responsibility of the Regional media-program contact is to review all Federal agency A-106 submissions and provide comments to the Federal Facilities Coordinator on media-related pollution abatement projects in the areas of engineering, timeliness, and cost to ensure that proposed projects have been appropriately designed and adequately funded to meet compliance requirements. In addition, Regional media-program contacts must work with the Federal Facilities Coordinator on identified media program priority areas that should be targeted for A-106 projects by Federal agencies.

As requested, media-program contacts should participate in on-site preliminary planning and design review conferences for significant projects with the Federal Facilities Coordinator.

Consent Decree Tracking System - In consultation with the Regional Federal Facilities Coordinator, media-program contacts will report to HQ/OECM on the status of compliance with the schedule and actions agreed to in an EPA Compliance Agreement or Consent Order with Federal facilities, following guidance on the Agency's Consent Decree Tracking System. Items reported should be consistent with SPMS requirements for consent decrees. (This is consistent with the guidance on "Consent Decree Tracking," Memorandum from Alvin L. Alm, Deputy Administrator, dated August 15, 1984.)

A.5 Regional Federal Facilities Coordinator

The Federal Facilities Coordinator is responsible for coordination with Regional program offices on implementation of Federal facilities compliance activities in the Regional office. The Coordinator also is the Regional liaison with the Office of External Affairs (OEA) and serves as the primary point-of-contact for EPA with all Federal agencies in the Region on environmental compliance matters. Duties of the Coordinator typically include:

- Ensuring that the Regional staff are knowledgeable on guidance issued by OEA;
- Coordinating and quality assurance of Regional A-106 reviews;
- Monitoring actions being taken by the Regional staff to resolve compliance problems at Federal facilities;
- Coordinating negotiations of Compliance Agreements; and
- Providing data to OEA on the compliance status of Federal facilities located in the Region.

Besides those duties mentioned above, the Federal Facilities Coordinator has specific responsibilities for implementing various aspects of this Strategy and the Federal facilities program as highlighted below.

Identifying the Regulated Community - Regional Federal Facilities Coordinators regularly identify Federal facilities information, by type of facility, (i.e., GOGO, GOCO, POGO, etc.) in the Facility Index System (FINDS) information system. Data for this system is provided by Regional program offices and States in order to track the compliance status of Federal facilities. In addition to identifying the regulated community via FINDS data, all Coordinators should develop a name list for applicable media programs of those Federal facilities minor sources considered to be environmentally significant (limited to no more than to 10% of all minor sources per program) and monitor the compliance status of these sources. Besides maintaining the list of minor sources, they also track those facilities which are the most environmentally significant in each Region. This list is updated annually in consultation with media program staff.

Technical Assistance/Training - The Federal Facilities Coordinators are tasked to conduct at least one Regional multi-media technical program workshop annually for Federal facilities in their Region with assistance from program offices. In addition, they invite Federal agency environmental personnel in each Region to bimonthly meetings to discuss new and upcoming program, generic compliance problems, etc.

The Coordinator serves as the Regional clearinghouse for information exchange with Federal agencies on new regulations, policies, etc. They also identify appropriate EPA training courses and workshops for the Federal agencies and in coordination with media program offices and conduct compliance program assistance visits to facilities to help them with overall environmental program practices and management.

As part of their technical assistance role, Federal Facilities Coordinators provide Federal agencies assistance with designing environmental auditing programs through training, workshops, guidance manuals, etc.

Compliance Monitoring - Federal Facilities Coordinators work with Regional program offices and Environmental Services Division (ESD) to establish quarterly targets for Federal facilities inspections and schedule multi-media inspections, as appropriate. As part of this effort, the Coordinators provide ESD annually with a name list of Federal facilities that are appropriate candidates to receive multi-media inspections based upon their environmental significance in a number of media program areas.

Part of their compliance monitoring tasks involve coordination with program offices prior to negotiations with States on the State/ EPA enforcement agreements to decide on a mutually acceptable approach to receive compliance and inspection data on Federal facilities from delegated or approved States.

Involvement in A-106 Review Process - Coordination of the Regional office review of Federal agency A-106 submissions is overseen by the Federal Facilities Coordinators in accordance with national guidance provided by OFA and OMB. The Coordinators work with the program offices in evaluating the adequacy of proposed projects in the areas of engineering, timeliness and cost to ensure that the projects have been appropriately designed and adequately funded to meet all compliance requirements. The Coordinators are responsible for final quality assurance of Regional reviews and for the timely submission of materials to OFA.

92

Copies of the A-106 submissions are provided by the Coordinators to the States in January of each year for their review. Once the States receive their copies, the Coordinators conduct an annual meeting with appropriate State representatives to discuss their comments on A-106 projects as well as any identified Federal agency patterns of noncompliance.

Federal agencies are informed of selected annual program priority areas toward which A-106 projects should be targeted. Federal Facilities Coordinators work with the agencies to ensure that A-106 projects are proposed for facilities with compliance problems.

Federal Facilities Coordinators are available to participate in preliminary planning and design review conferences on significant projects at Federal facilities, as appropriate. They may also request media program technical assistance when necessary.

Responding to Violations - At the beginning of the fiscal year, in coordination with the Regional program offices, the Regional Federal Facilities Coordinators identify the names of those Federal facilities in significant noncompliance. They assist with negotiations of Compliance Agreements between EPA media programs and involved Federal agencies to resolve identified compliance problems and violations. As part of this process, the Coordinator may informally notify the Federal facility of identified violations following an EPA inspection and prior to issuance of written notification of violation. The FFC should initiate informal notification process after first consulting with the affected media program offices.

Dispute Resolution Process - As described in Chapter VI, Federal Facilities Coordinators may informally request Headquarter's OFA assistance in resolving disputes at any point in the Federal facilities compliance resolution process. They also will assist the program office in developing referral packages for disputes formally referred to Headquarters under the Regional Administrator's signature.

Consent Decree Tracking - Each Coordinator provides the program offices assistance with tracking the status of EPA Compliance Agreements and Consent Orders with Federal facilities for reporting to Headquarters and input into the Agency's Consent Decree Tracking System.

B. HEADQUARTERS OFFICES

The following Headquarters staff have certain responsibilities for working with the Regions on Federal facilities activities, resolving compliance problems, and developing policy and guidance:

- Program Offices;
- OEA/OFA;
- OECM;
- OGC; and
- Office of the Administrator.

See Exhibit VIII-2 at the end of this chapter for a diagram depicting these Headquarters relationships.

B.1 Headquarters Program Offices

In order to fully implement this Strategy it is critical that the program offices work with OFA to ensure that media-specific regulations, policies and guidance, and Federal facilities compliance guidance are mutually consistent and address Federal facilities compliance issues where appropriate. Also, it is important that the program offices:

- Meet with OFA periodically to identify and discuss generic compliance problems at Federal facilities.
- Continue to provide OFA with speakers, documents and other assistance for the monthly meetings of the EPA/Federal Agency Environmental Roundtable.
- Ensure that Headquarters evaluations of Regional programs address Federal facilities compliance and that program offices report the results of these evaluations to OFA.

In addition to these general responsibilities, Headquarters program offices are tasked to ensure that specific initiatives of this Strategy are integrated program-wide as discussed below.

Identifying the Regulated Community - Program office staff will maintain current Federal facilities data on program information systems and data bases for tracking purposes based upon input from Regions and States and ensure that proper Federal facilities identification numbers are included for all appropriate sources.

Compliance Monitoring - Headquarters program office staff will ensure that the required number of Federal facilities inspections (of majors, etc.) are being conducted annually by Regions and the States, as appropriate. Headquarters will verify that the Regions are conducting at least the same number of oversight inspections for Federal facilities as for other facilities in delegated States.

Dispute Resolution Process - The involved media program office shall have the lead in resolving disputes referred to Headquarters, in cooperation with OFA and OECM. Each of the Headquarters program offices shall provide technical advice and assistance in the resolution of disputes upon referral from the Region. Headquarters media program offices shall notify OFA and provide copies of any Federal facility disputes which have been referred to their office, either formally or informally.

Compliance Statistics - Headquarters program offices will work with OMSE, OECM and OFA to improve the quality of Federal facilities data currently in EPA's various Headquarter and Regional media tracking and information systems. Program offices will periodically review their definitions of "majors" to ensure that Federal facilities are adequately addressed. In addition, appropriate offices will issue guidance requiring Regions and States to code input data into existing tracking and information systems with Federal facilities indicators and identification numbers as appropriate. Periodic management reports for the Federal facility subset of regulated sources for submittal to OFA will be prepared by program office staff, as requested.

Involvement in A-106 Review Process - Review of Regional program staff A-106 submissions by the program offices is necessary to ensure that media program priority areas are reflected in proposed projects and to identify compliance problems. All program offices should meet annually with OFA to update media program priority areas that are to be addressed by Federal agencies through the A-106 process.

Development of Policy and Guidance - Media-specific policies and guidance will be developed by appropriate program offices. These policies and guidances should, where appropriate, address implementation of program requirements by Federal agencies. Upon request by the media program office, OFA can coordinate Federal agency review and comment on media program documents.

B.2 Office of External Affairs/Office of Federal Activities

OEA/OFA is responsible for ensuring effective implementation of Section 1-6 of Executive Order 12088 which specifies the administrative procedures to be used in resolving compliance problems at Federal facilities. OEA/OFA also chairs the EPA Standing Committee on E.0. 12088.

OEA establishes applicable Agency policy and guidelines on Federal facilities compliance in consultation with OECM, OGC and the Headquarters program offices. Implementing operating guidance for the Regional Federal Facilities Coordinators is developed and issued by OEA/OFA.

OFA conducts annual audits (i.e., the FARES review) of Regional Federal facilities programs to ensure proper adherence to national guidance, thorough coordination with Regional program offices, adequate and ongoing assistance to Federal agencies, and overall consistency of the program with this Strategy.

OEA is the principal point-of-contact with the national offices of other Federal agencies through the EPA/Federal Agency Environmental Roundtable.

OEA assists affected Headquarters program offices in resolving Federal facilities compliance problems which the Regional offices escalate for dispute resolution. In addition, OEA actively participates in Agency strategic planning and management systems to ensure Federal facilities compliance concerns are being integrated into program priorities and plans and provides analysis of patterns of Federal facilities noncompliance to program offices on an annual basis.

Periodic reports on the compliance status of Federal facilities are prepared by OEA/OFA for administrative purposes. A quarterly report identifying major Federal facilities which are not meeting substantive pollution control requirements is produced for the Administrator. The Federal agencies are provided, semi-annually, with a listing of all non-complying facilities under their jurisdiction. A similar report is submitted annually to the OMB. This OMB report will be expanded to include information on the compliance status of all Federal facilities. In addition, OEA/OFA conducts annual meetings with Headquarters offices of other Federal agencies to discuss identified patterns of noncompliance. Other OEA/OFA Federal facilities responsibilities are addressed below.

Identifying the Regulated Community - Coordination with Headquarter program offices and the FINDS office is done by OEA/OFA staff to ensure that program information systems have adequate and current information for tracking Federal facilities compliance status.

Technical Assistance/Training - OEA/OFA conduct monthly meetings of the EPA Federal Agency Environmental Roundtable for top Federal agency officials to exchange information on new regulations, policies, etc. Participation of program office staff is solicited regularly for these meetings.

Currently, OEA/OFA is implementing a comprehensive system for technical assistance, training and information transfer in cooperation with program offices and Regional Federal Facilities Coordinators.

OEA/OFA serves as a national clearinghouse for opportunities for other Federal agency participation in EPA training courses and workshops, and technical assistance services available from the National Enforcement Investigations Center (NEIC) and the Office of Research and Development (ORD) labs. Also, ensures that all of the EPA Hotlines are accessible to Federal agency personnel.

OEA/OFA coordinates extensively with the Office of Administration and Resources Management (OARM) in the planning and development of the EPA Training Institute to ensure opportunities are available for Federal facilities participants. Also, coordination with OECM on the development of the basic inspector training course occurs for the same purpose.

Federal agencies are encouraged to implement environmental auditing programs and OEA/OFA provides assistance in designing and establishing such programs through workshops, manuals, guidance, etc.

Dispute Resolution Process - When requested by Regional program staff, in consultation with the Federal Facilities Coordinator, OFA will provide informal assistance by working with involved agencies' parent offices to attempt to resolve disputes. Such assistance includes working with the parent agency of the noncomplying facility, where appropriate, to ensure that funds are made available to correct identified violations as expeditiously as possible or to secure the cooperation of a recalcitrant facility manager.

After the RA has tried but been unable to resolve disputes within established media timeframes, the cases are formally referred jointly to Headquarters media program office, OECM and OFA for resolution. Upon receipt of the referral package, OFA or the media program office will notify the RA in writing of their receipt of the package.

OEA/OFA may assist in negotiations of a mutually acceptable solution between EPA media programs and the official responsible for environmental compliance matters at the Headquarters of the parent agency. If this effort fails, within a maximum of 90 days the AA for the affected media program office escalates the problem to the EPA Administrator for resolution.

OFA will develop and maintain a system for notifying the Regional Administrator informally on a monthly basis and formally on a quarterly basis on the status of those Federal facilities actions formally referred to Headquarters.

Involvement in A-106 Review Process - OEA/OFA is tasked to coordinate the Agency-wide review of Federal agency A-106 submissions via the Pollution Status Report and produce the annual report to OMB evaluating proposed projects for use by OMB in budget review process.

B.3 Office of Enforcement and Compliance Monitoring

OECM advises the Administrator, and OEA, and provides guidance to the Regional Offices on general enforcement and compliance policy issues relating to Federal facilities including:

- Determining the compliance status of Federal facilities;
- Assessing the sufficiency data supporting compliance determinations;
- Conducting negotiations of agreements on solutions to compliance problems;
- Resolving compliance disputes with Federal facilities;
- Assuring that Federal facilities compliance efforts support national compliance and enforcement objectives;
- Developing (with OFA and media programs) compliance and enforcement strategy guidance for Federal facilities;
- Coordinating and overseeing the State/EPA enforcement agreements process;
- Maintaining the Agency consent decree tracking system, including tracking of Federal facilities compliance agreements; and
- Conducting follow up on possible criminal violations.

OECM also provides assistance and expertise in the use of alternative dispute resolution procedures for resolving compliance problems at Federal facilities.

B.4 Office of General Counsel

OGC provides legal advice and assistance to the Administrator, OEA, media program offices and the Regional counsels on legal matters and interpretations related to Federal facility compliance with the environmental statutes. OGC also plays a major role in resolving interagency legal disputes and in making referrals to the Department of Justice under Executive Order 12146 when necessary.

EXHIBIT VIII-1

EPA REGIONAL OFFICE STAFF

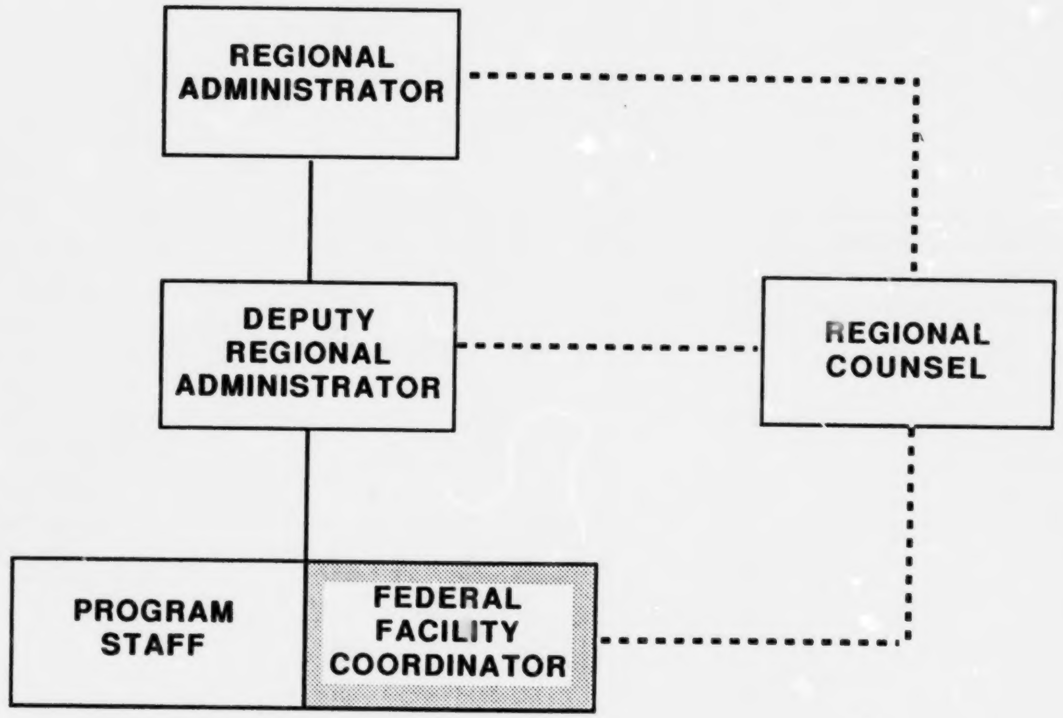
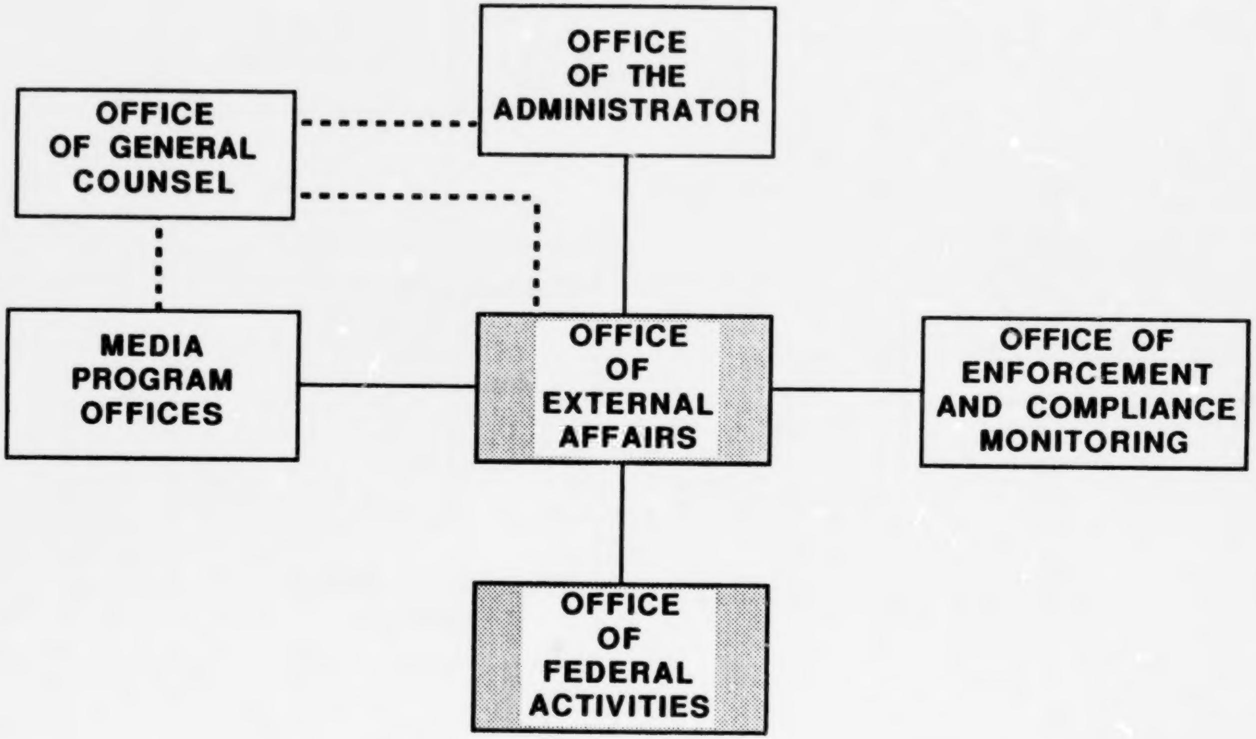

REGIONAL ADMINISTRATOR
DEPUTY REGIONAL ADMINISTRATOR
REGIONAL COUNSEL
PROGRAM STAFF
FEDERAL FACILITY COORDINATOR

EXHIBIT VIII-2

EPA HEADQUARTERS OFFICE STAFF


OFFICE OF THE ADMINISTRATOR
OFFICE OF GENERAL COUNSEL
MEDIA PROGRAM OFFICES
OFFICE OF EXTERNAL AFFAIRS
OFFICE OF ENFORCEMENT AND COMPLIANCE MONITORING
OFFICE OF FEDERAL ACTIVITIES

APPENDICES TO THE FEDERAL FACILITIES COMPLIANCE STRATEGY

APPENDIX A

SUMMARIES OF FEDERAL ENVIRONMENTAL STATUTES

- CLEAN AIR ACT
- CLEAN WATER ACT
- RESOURCE CONSERVATION AND RECOVERY ACT
- FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT
- TOXIC SUBSTANCE CONTROL ACT
- COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT
- SAFE DRINKING WATER ACT

APPENDIX A

SUMMARY OF POLLUTION CONTROL LEGISLATION

This appendix is a synopsis of the Federal approach to environmental regulation, EPA enforcement remedies and a summary of each of the major pollution control acts: the Clean Air Act (CAA), the Clean Water Act (CWA), the Resource Conservation and Recovery Act (RCRA), the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA/Superfund), the Toxic Substances Control Act (TSCA), the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), and the Safe Drinking Water Act (SDWA). Because these laws and the regulations promulgated thereunder typically are very complex and continually are being modified, the investigator should carefully review the specific provisions which apply to the operations of the facility before conducting an inspection.

GENERAL FEDERAL APPROACH TO ENVIRONMENTAL REGULATION

National standards are established to control the handling, emission, discharge and disposal of harmful substances. Waste sources must comply with these national standards whether the programs are implemented directly by the EPA or delegated to the States. In many cases, the national standards are applied to sources through permit programs which control the release of pollutants into the environment. The EPA establishes the Federal standards and requirements and approves State programs for permit issuance.

The States can set stricter standards than those required by Federal law. Some of the larger programs which have been delegated by the EPA to qualifying States are the National Emissions Standards for Hazardous Air Pollutants (NESHAP), the Prevention of Significant Deterioration (PSD) permits under the CAA, the Water Quality Standards and the National Pollution Discharge Elimination System (NPDES) programs under the CWA, the Hazardous Waste Program under RCRA, and the Drinking Water and Underground Injection Control (UIC) programs under the SDWA. Conversely, TSCA is administered entirely by the Federal government.

EPA ENFORCEMENT OPTIONS

1. Issuance of an Administrative Compliance Order, sometimes preceded by a Notice of Violation*. A Compliance Order will specify the nature of the violation and give a reasonable time for compliance. The order, if violated, can lead to enforcement action pursuant to the civil and/or criminal process of environmental laws.

2. Issuance of an administrative complaint for civil penalties. Parties named in such complaints must be given notice and an opportunity for a hearing on the alleged violations before a penalty can be assessed by EPA.

3. Under certain statutes (e.g., SDWA) EPA may take whatever action is necessary to protect the public health, in emergency situations, without first obtaining a judicial order.

4. EPA generally may go directly to Federal court seeking injunctive relief or a civil penalty without using administrative procedures. EPA also may obtain an emergency restraining order halting activity alleged to cause "an imminent and substantial endangerment" or "imminent hazard" to the health of persons.

5. EPA may go directly to Federal court seeking criminal sanctions without using administrative procedures. Criminal penalties are available for "knowing" or for "willful" violations.

In addition, EPA can also "blacklist" a company or party that fails to comply with the CAA or CWA by preventing it from entering into Federal contracts, loans and grants. In cases where the party had been convicted of certain criminal offenses under the CAA or CWA, Federal agencies are expressly prohibited from entering into contracts, etc., with that entity.

CLEAN AIR ACT

The Clean Air Act (CAA) calls for the EPA to establish national ambient air standards. These standards are expressed as concentrations of designated pollutants and are called National Ambient Air Quality Standards (NAAQS). These standards are to be achieved by the States through State Implementation Plans (SIPs). The SIP provides emission limitations, schedules and timetables for compliance by stationary sources, as well as transportation control plans for mobile sources EPA also sets the following national air emission standards: New Source. Performance Standards (NSPS), National Emissions Standards for Hazardous Air Pollutants (NESHAP) and standards governing mobile sources of air pollution (including motor vehicle fuels). Moreover, special programs have been developed for prevention of significant deterioration (PSD) in clean air areas and for stringent controls in non-attainment areas (NAAs).

---

* A concise written statement with factual basis for alleging a violation and a specific reference to each regulation, act, provision or permit term allegedly violated.

The act focuses upon "major" stationary sources or major modification of existing sources. Major sources are defined as sources which generally emit more than 100 tons/year of a designated pollutant.

National Ambient Air Quality Standards/State Implementation Plans

EPA designates pollutants and publishes criteria documents which discuss potential harmful effects of those pollutants. The Agency then sets primary and secondary ambient air standards for criteria pollutants (CAA, Section 109). Primary standards are intended to protect the health of the population, whereas, secondary standards are meant to protect against welfare effects, including effects on the environment.

Standards have been established for six pollutants: sulfur dioxides particulates carbon monoxide, ozone, nitrogen oxides and lead. These standards are implemented through SIPs (CAA, Section 110).

EPA has designated 247 Air Quality Control Regions (AQCRs). These have been rated as either "clean" or "non-attainment" for each of the criteria pollutants. SIPs are to provide for attainment of NAAQS by prescribed dates. SIPs must meet Federal requirements, but each State may generally choose its own mix of emissions for stationary and mobile sources to meet the NAAQS. Control procedures may include stationary source emission limits, transportation plans, preconstruction review of new sources, monitoring and inspection and testing of vehicles. The CAA prescribes that no SIP will be adopted without a public hearing, and sources affected by the SIP may participate.

New Source Performance Standards

NSPS are established for specific pollutants in industrial categories, based upon adequately demonstrated control technology. Many States have been delegated the authority to enforce NSPS. When a State does not have the authority, EPA enforces NSPS in that state. Waivers from NSPS for up to 7 years may be obtained, the purpose of which is to encourage use of innovative technological systems (CAA, Section 111).

National Emissions Standards for Hazardous Air Pollutants

Section 112 of the CAA defines hazardous air pollutants as those for which no ambient air quality standard is applicable but which are judged to increase mortality or serious irreversible or incapacitating illness. NESHAP standards are based on health effects with strong reliance on technological capabilities. They apply to both existing and new stationary sources. NESHAPs have been established for seven pollutants: benzene, beryllium, asbestos, mercury, vinyl chloride, radionuclides and arsenic. The NESHAP program can be delegated to any qualifying State (CAA, Section 112).

Prevention of Significant Deterioration

The purpose of PSD is to avoid significant future degradation of the nation's clean air areas. A clean air area is one where the air quality is better than the ambient primary or secondary standard. Designation is pollutant-specific so that an area can be non-attainment for one pollutant but clean for another. PSD applies only to new and modified sources in clean air areas. Clean air areas are divided into three categories: Class I - only minor air quality degradation allowed, Class II - moderate degradation; and Class III - substantial degradation. In no case would PSD allow air quality to deteriorate below secondary air quality standards.

"Baseline" is the existing air quality for the area at the time the first PSD permit is applied for. "Increments" are the maximum amount of deterioration that can occur in a clean air area over baseline. Increments in Class I areas are smaller than for Class II and Class II increments are smaller than Class III areas. For purposes of PSD, a major emitting source is one of 26 designated categories which emits or has the potential to emit 100 tons/year of the designated air pollutant. A source that is not within the 26 designated categories is a major source if it emits more than 250 tons/year.

New sources are required to obtain permits before construction. The permit describes the level of control to be applied and what portion of the increment may be made available to that source by the State (CAA, Part C).

Non-Attainment Areas (NAA)

Non-attainment areas are those which are not in compliance with national air quality standards. New construction in an NAA is prohibited unless the SIP has been amended and approved by EPA to reflect the following conditions:

1. Total allowable emissions for the source will be offset by reductions in emissions from existing sources.

2. The new source must comply with the lowest achievable emission rate (LAER).

3. All other sources within the State owned by the subject Company are in compliance.

4. The SIP is being carried out for the area.

Emission offsets from existing sources have to be obtained through enforceable agreements from other sources in the NAA.

Emission reductions can also be "banked" by an existing source to permit future new source growth. Banked offsets may be sold or traded to other sources.

Emission Standards for Mobile Sources/Fuel Standards

Section 202 of the CAA directs EPA to regulate air pollutants emitted by motor vehicles which "cause, or contribute to, aire pollution which may reasonably be anticipated to endanger public health or welfare." In response, the Agency has set standards governing motor vehicle emissions of carbon monxide, hydrocorbons, oxides of nitorgen and particulates. These standards have given rise to the emission control systems that first appeared in automoblies in the early 1970s. The CAA generally prohibits the removal (or rendering inoperative) by any person in the motor vehicle business, or any fleet operator, of any emission control device that was installed by the vehicle manufacturer in order to meet the applicable emission standards. Many states have enacted similar laws enforcing this prohibition and/or have incorporated such prohibitions as part of their SIPs.

The CAA also provides EPA with the authority to control or prohibit the use of fuels which pose a public health risk or which "impair to a significant degree the performance of any emission control device or system." The Agency's regulations governing the lead content of gasoline are based upon both of these rationales. Certain other fuel standards have been adopted by some states through SIP provisions and/or State laws.

CLEAN WATER ACT (FEDERAL WATER POLLUTION CONTROL ACT)

Through the 1950s and 1960s, emphasis was on the States setting ambient water quality standards and developing plans to achieve these standards. In 1972, the Federal Water Pollution Control Act was significantly amended. These changes emphasized a new approach, combining water quality standards and effluent limitations (i.e., technology.-based standards). The amendments called for compliance by all point-source discharges with the technology-based standards. A strong Federal enforcement program was created and substantial monies were made available for construction of sewage treatment plants. The Federal Water Pollution Control Act was amended in 1977 to address toxic water pollutants and in 1987 to refine and strengthen priorities under the Act as well as enhance EPA's enforcement authority. Since the 1977 amendments, the Federal Water Pollution Control Act has been commonly referred to as the Clean Water Act (CWA).

State Water Quality Standards and Water Quality Management Plans

Section 303 of the CWA authorizes the States to establish ambient water quality standards and water quality management plans. If national technology standards are not sufficient to attain desired stream water quality, the State shall set maximum daily allowable pollutant loads (including toxic pollutants) for these waters and, accordinly, determine effluent limits and compliance schedules for point sources to meet the maximum daily allowable loads.

The National Pollutant Discharge Elimination (NPDES) Program

This program was established by Section 402 of the CWA and, under it, EPA and approved States have issued more than 50,000 NPDES permits. Permits are require for all point sources from which pollutants are discharged to navigable waters of the United States. An NPDES permit is required for any direct discharge from new or existing sources. Indirect discharges through POTWs are regulated under a separate program (see discussion of pretreatment standard below). In 1979 and 1980, the permit program was revised to authorize the permitting authority to require the use of Best Management Practices (BMPs) to control the discharge of toxic and hazardous pollutants into waters of the United States through plant site run-off, spillage, or leaks; sludge or waste disposal; or drainage from raw material storage. Unlike effluent limitations, BMPs do not have numberical limits, but rather describe in narrative form the management practices that must be undertaken, e.g., raw material storage piles shall be covered and protected against rain and runoff.

Section 301 of the CWA requires permits to contain effluent limits reflecting that level of pollutant reduction attainable by installation of specified levels of technology. These limits are set forth in nationally applicable effluent guideline regulations for industrial categories and incorporated into permits. Where a regulation for a particular industrial category has not been issued, limits are developed on a case-by-case basis. Limits are usually expressed as weight per unit of product (i.e., 0.5 lb/1,000 lb product manufactured). The standards are different for each industry. Effluent guidelines are applied to individual plants through the NPDES permit program.

There are three levels of technology for existing industrial sources: Best Practicable Control Technology (BPT), Best Conventional Technology (BCT) and Best Available Technology Economically Achieveable (BAT). Timetables for compliance with limits reflecting these technology levels have been modified -- most recently by Section 301 of the 1987 Amendments. These compliance dates are found at 40 CFR Section 125.3.

New Source Performance Standards (NSPS) impose on new sources technology-based requirements that are based on the best available demonstrated technology. The new source provisions recognize that, unlike existing sources which often must retrofit to meet water pollution control measures, new sources are better able to afford advanced pollution control technology. NSPS are different for each industrial category. These standards must be achieved when the new industrial source begins to discharge. New sources are provided a ten-year protection period during which qualifying sources may not be subject to certain more stringent requirements. This 10-year protection insulates against change in BCT or BAT requirements but does not hold against Section 307(a) toxic pollutant standards or against non-toxic pollutants if such limitations are identified to control indirectly hazardous or toxic pollutants.

To obtain an NPDES permit, an application must be made. Adequate information must be submitted as set forth in 40 CFR 122.21 using application forms provided for this purpose. The information requested includes basic facility descriptions, SIC codes, regulated activities, lists of current environmental permits, descriptions of all outfalls, drawings, flows, treatment, production, compliance schedules, effluent characteristics, use of toxics, potential discharge and bio-assay toxicity tests performed.

Applicants must conduct analytical testing for BOD, COD, TOC, TSS, ammonia, temperature and pH. The applicant, if included within any of the 34 "primary industry" categories, must sample for all toxic metals, cyanide and phenols given the EPA Application Form 2C and for specified organic toxic pollutant fractions.

The applicant must list substances believed to be present at the industrial plant. Testing is not required but analytical results must be provided, if available.

NPDES Permit

The NPDES permit, issued by EPA or the State, enforces Federal effluent limitations promulgated for individual industrial categories; NSPS; toxic effluent standards; State water quality standards, if any are applicable and hazardous substances otherwise regulated under Section 311 of the CWA that may be incorporated into the NPDES permit instead. Permit elements include the amount of pollutants to be discharged expressed in terms of average monthly and maximum daily loads; compliance schedules, if applicable standards cannot be met now; and monitoring, testing and reporting requirements.

Routine Non-compliance Reports - The Discharge Monitoring Form

The Discharge Monitoring Report (DMRt gives a summary of the discharger's records on a monthly or quarterly basis for flow measurement, sample collection and laboratory analyses. Noncompliance reports must be submitted quarterly on the cause of noncomplying discharges, period of non-compliance, expected return to compliance and plans to minimize or eliminate recurrence of the incident.

Emergency Reporting

- o Health: The EPA shall be notified within 24 hours of noncompliance involving discharge of toxic pollutants, threat to drinking water or injury to human health.
- o Bypass: Noncompliance due to intentional diversion of waste shall be reported promptly to the permitting agency and may be permissable if essential to prevent loss of life or serious property damage.
- o Upset: Temporary noncompliance due to factors beyond the reason able control of the permittee shall be promptly reported to the agency.

The 1987 CWA Amendments establish a schedule for the regulation of municipal and industrial stormwater discharges under NPDES permits. Initially (before October 1, 1992), only major dischargers and those who are significant contributors of pollutants will be required to obtain permits.

Pretreatment Standards for Indirect Discharges to Publicly-Owned Treatment Works

Coverage

New and existing industrial users who discharge to POTWs are subject to general and categorical pretreatment standards. The categorical standards are primarily directed to control of toxic pollutants in specific industries.

Requirements

o General Pretreatment Standards (40 CFR Section 403.5(a) and (b) Prohibition against discharges that pass through or interfere with POTW. Prohibit fire or explosion hazards, corrosivity, solid or viscous obstructions, "slug" discharges, and heat sufficient to inhibit biological activity at POTWs

o Categorical Standards (40 CFR Parts 405-471)

Standards to be expressed as concentration limits or mass weight per unit of production.

Source must be in compliance no later than 3 years after promulgation of standards.

Variances can be obtained for fundamentally different factors.

- Reports (40 CFR Section 403.12)

  Users must provide the appropriate agency (EPA, State or POTWs having approved pretreatment programs) with basic information, SIC code, average and maximum daily discharge, characteristics or pollutants, applicable standards and certification whether standards are being met and, if not, what pretreatment is necessary and a compliance schedule.

- Monitoring, Sampling and Analysis (40 CFR Section 403.12)

  Users shall submit sampling data for each regulated pollutant in discharge.

- Progress Reports

  Reports and information shall be submitted at 6-month intervals.

Non-point Source Pollution Control

Section 208 of the CWA directs States to estalish planning bodies to formulate area-wide pollution control plans, which are to include controls for non-point source pollution. NPDES permits cannot be issued where the permit may conflict with an approved Section 208 plan.

The 1987 CWA Amendments require States to develop nonpoint source management programs under Section 319.

Dredge or Fill Discharge Permit Program

Section 404 of the CWA regulates the discharge of dredged or fill material into waters of the United States. Dredged material is excavated or dredged from a water body. Fill material is that material used to replace water with dry land. The Section 404 permit program is administered by the U.S. Army Corps of Engineers. EPA provides guidelines for the issuance of permits by the Corps of Engineers. States may assume responsibility for portions of the program.

Discharge of Oil and Hazardous Substances

Section 311 of the CWA prohibits discharges to waters of the United States of oil or hazardous substances in quantities that may be harmful The appropriate Federal agency must be immediately notified of any spill of a "reportable quantity." Section 311 provides for cleanup of spills and requires the preparation and implementation of Spill Prevention, Control, and Counter-measures (SPCC) plans.

297 substances have been defined as hazardous under Section 311 and each of these substances has a "reportable quantity" (40 CFR Parts 116 and 117).

A person or corporation who properly notifies the Agency of the discharge of a reportable quantity of oil or hazardous substance is immune from criminal prosecution but is liable for civil penalties. Additionally, those who cause the spill are liable for the costs of cleanup and removal. If the Federal government must clean up the spill, the discharger of the spill is liable for cleanup costs. There are maximum liability limits, depending upon the type of facility and spill. These limits do not apply if the discharge resulted from willful negligence or willful misconduct of the owner.

Certain discharges of oil and hazardous material that flow from a point source may be excluded from Section 311 liability if, during preparation of the NPDES permit covering that facility. conditions are added to the permit to avoid the occurrence of a spill.

RESOURCE CONSERVATION AND RECOVERY ACT OF 1976 (RCRA)*

RCRA was signed on October 21, 1976 and subsequently amended in 1978, 1980, 1984 and 1986. The 1984 amendments to RCRA brought about dramatic changes in the coverage required by the Act. The first in a series of regulations restricting the land disposal of hazardous wastes have been promulgated. Regulations also have been proposed which will include expanded coverage in such areas as waste oil, underground tanks, etc. The Act primarily deals with current and future waste handling activities: however, one section of the act (Section 7003), addresses problems which may have arisen prior to 1976. The 7003 provision allows EPA to take action against persons conducting past and current activities that may present "an imminent or substantial endangerment to health or to the environment." The 1984 amendments also provide for corrective actions against contamination resulting from past releases of hazardous waste even without an imminent hazard. A review of the Act and the implementing regulations by th inspector is imperative before conducting an inspection, due to these changes.

Non-hazardous solid wastes, if land disposed. are regulated through State programs Subtitle D of RCRA. Hazardous solid wastes are subject to regulation in their generation, transport, treatment, storage and disposal under Subtitle C of RCRA. Subtitle C of the statute authorizes a comprehensive Federal program to regulate hazardous wastes from generation to ultimate disposal. A waste is hazardous under Subtitle C if it is listed by EPA as hazardous or if it exhibits hazardous characteristics (corrosivity, reactivity, ignitability and extraction procedure toxicity† and if not delisted or excluded from regulation. There are special management provisions for hazardous wastes created by small quantity generators and hazardous wastes that are intended to be reused or recycled.

---

* 43 U.S.C. Section 6901 et. seq. and Solid Waste Disposal Act amendents of 1980, P.L. 96-482, 94 State. 2334.

111

Solid waste includes garbage, refuse and sludge, other solid, liquid, semi-solid or contained gaseous material which is discarded, has served its intended purpose or is a mining or manufacturing byproduct. Most industrial and commercial byproducts can qualify as a solid waste. Exclusions from solid waste include domestic sewage, irrigation return flows, materials defined by the Atomic Energy Act, in situ mining waste and NPDES point sources.

Solid wastes excluded from regulation as hazardous solid wastes are household waste., crop or animal waste., mining overburden and wastes from processing and benefication of ores and minerals: flyash, bottom ash waste, slag waste and flue gas emission control waste and drilling fluids from energy development. A waste can be "delisted" from the hazardous waste listing or excluded for other reasons. Some materials intended to be reused or recycled are not fully regulated as solid/hazardous wastes, while others, depending upon the type of waste generated and the recycling process used, are fully regulated.

Statutory Restrictions/Prohibitions

- November 8, 1984 - The placement of any bulk liquid hazardous waste in salt domes, salt bed formations, underground mines or caves is prohibited until the facility receives a permit.
- May 8, 1985 - The landfilling of bulk or noncontainerized liquid hazardous waste or free liquids contained in hazardous waste is Prohibited.
- November 8, 1985 - The placement of any nonhazardous waste liquid in a landfill operating under interim status or a permit, is prohibited unless the only reasonable alternative is a hazardous waste landfill or unlined surface impoundment and the landfill will not present a risk of contamination to groundwater drinking sources. See Section 3004(c)(3) for full graphics.
- November 8, 1986 - The disposal of hazardous waste solvents (codes F001 through F005) and dioxins containing hazardous waste (codes F020 through F023) is prohibited unless waste is pretreated to EPA standards or disposal is protective of human health and the environment. (Wastes -- only contaminated soils and debris) generated by Superfund and RCRA corrective actions are not affected until November 8, 1988.) See final rule, 51 Federal Register 40572 (November 7, 1986), to be codified at 40 CFR Part 268, with conforming amendments at 40 CFR Parts 260, 261, 262, 264, 265, 270 and 271.
- July 8, 1987 - Land disposal of wastes listed in Section 3004(d)(2) (the "California list") is prohibited unless human health or the environment is not endangered (Wastes generated by Superfund and RCRA enforcement actions not affected until November 8, 1988.) See Final Rule, 1987.

- May 8, 1985 - New wastepile units, lateral expansions and replacement of existing wastepile units at interim status waste piles are to have single liners and leachate collection systems.

  New landfill/SI units, lateral expansions and replacement of existing landfill/SI units at interim status landfills are to have double liners and leachate collection systems. (2 for landfill.)

- August 8, 1988 - Deep well injection of certain wastes is prohibited unless deemed safe by EPA. See Section 3004(d)(2) and (e)(2) for list of wastes.

List of Hazardous Wastes

Hazardous waste streams from specific major industry groups and some generic sources (40 CFR, Part 261, Subpart D, 261.31 and 261.32) and well over 200 toxic commercial chemical wastes (i.e., discarded commercial chemical products are included on the list of hazardous wastes (40 CFR 261.33). If a commercial chemical substance is on the list, its off-spec species is also considered hazardous when discarded, as are spill residues. Some of the listed wastes are acutely toxic and are regulated at lower generation levels than other hazardous wastes. See e.g., 40 CFR 261.33(e), 261.5(e) 261.7(b)(3).

Special Management Provisions

- Small Quantity Generators

Small quantity generators are those that generate less than 1,000 kg per month of hazardous waste. There are two classes of small quantity generators:

1. Generators of between 100 and 1,000 kg per month that are subject to most of the requirements of 40 CFR Part 262 which apply to fully regulated generators, except that they are allowed to accumulate up to 6,000 kg of hazardous waste and to store waste for up to 180 to 270 days.

2. Generators of less than 100 kg per month that are exempt from regulation under 40 CFR Part 262 so long as they do not accumulate greater than 1,000 kg of hazarous waste, properly identify their wastes and comply with the less stringent waste treatment, storage and/or disposal requirements of 40 CFR 261.5.

   Note that the classification of the generator is a function of the total wastes generated, not each waste stream. In addition, for acutely toxic wastes, if more than 1 kg per month of waste or 100 kg per month of spill residues are generated, all quantities of that waste are fully regulated.

- Recycling or Reuse

  The type of waste generated and/or the recycling process employed will determine whether recycled/reused materials are a solid/hazardous waste. Some of these materials are not considered solid wastes, some are solid wastes but not hazardous wastes, while others are hazardous but are not subject to full regulation, and still other of these materials are botholid and hazardous waste that are fully regulated. The circumstances surrounding the apparent recycling/reuse of waste materials should be thoroughly documented during and inspection.

Requirements for Generators*

- Identification - Hazardous wastes must be identified by list, testing or experience and assigned waste identification numbers.

- Notification - No later than 90 days after a hazardous waste is identified or listed in 40 CFR, Part 261, a notification is to be filed with EPA or an authorized State. An EPA identification number must be received.

- Manifest System - Implement the manifest system and follow procedures for tracking and reporting shipments. Beginning September 1, 1985, a waste minimization statement is to be signed the generator [see RCRA Section 3002(b)].

- Packing - Implement packaging, labeling, marking and placarding requirements prescribed by DOT regulations (40 CFR, Parts 172, 173, 178 and 179).

- Biannual Report - Submittal required March 1 of even years using EPA Form 8700-13.

- Exception Reports - When generat,r does not receive signed copy of manifest from designated TSDF within 45 days, the generator sends Exception Report to EPA including c,py of manifest and letter describing efforts made to locate waste and findings.

- Permit for Storage More Than 90 Days - If hazardous wastes are retained onsite more than 90 days (and no extension under 262.34(b)), generator is subject to all requirements applicable to TSDFs and must obtain a RCRA permit.

---

* 40 CFR Part 262

111

- Accumulation - Generator is not required to obtain a permit for on-site accumulation of waste for less than 90 days, if generator complies with special requirements including contingency plan, prevention plan and staff training (40 CFR, Part 265, Subparts C, D, J and 265.16).

Requirements for Transporters*

- Notification - No later than 90 days after a hazardous waste is identified or listed in 40 CFR, Part 261, a notification is to be filed with EPA or an authorized State. Receive EPA identification number.
- Manifest System - The transporter must fully implement the manifest system. The transporter signs and dates manifest, returns one copy to generator, assures that manifest accompanies waste, obtains date and signature of TSDF' or next receiver and retains one copy of the manifest for himself.
- Delivery to TSDF - The waste is delivered only to designated TSDF or alternate.
- Record Retention - Transporter retains copies of manifest signed by generator, himself and accepting TSDF or receiver and keeps these records for a minimum of 3 years.
- Discharges by transporters other than bulk water transporters. If discharges occur, notice shall be given to National Response Center. Appropriate immediate action shall be taken to protect health and the environment and a written report shall be made to the DOT.

Requirements for Treatment, Storage or Disposal Facilities (TSDFs)**

- Notification - No later than 90 days after a hazardous waste is identified or listed in 40 CFR, Part 261, a notification is to be filed with EPA or an authorized State.
- Interim Status - These facilities include TSDFs; onsite hazardous waste disposal; onsite storage for more than 90 days; in transit storage for greater than 10 days and the

---

* 40 CFR Part 263

** 40 CFR Parts 264 and 265

115

storage of hazardous sludges, listed wastes, or mixtures containing listed wastes intended for reuse. Interim status is achieved by:

- Notification (see above)
- Being in existence on November 19, 1980 or on the date of statutory or regulatory changes which require the facility to have a permit.
- Filing a Part A

o Interim Status Facility Standards - The following standards and requirements shall be met.

- General information (Subpart B)
- Waste analysis plan
- Security
- Inspection plan
- Personnel training
- Handling requirements
- Preparedness and prevention
- Contingency planning and emergency procedures (Subparts C and D)
- Records and reports
- Manifest system
- Operating logs
- Annual and other reports (Subpart E)
- Groundwater Monitoring (Subpart F)
- Closure and post-closure plans (Subpart G) Financial requirements (Subpart H)
- Containers, tanks, surface impoundments, piles (Subparts I, J, K, L)
- Land treatment, landfills, incinerators, thermal treatment, chemical, physical and biological treatment (Subparts M, N,O, P, Q)

- Underground injection (Subpart R)

- Permit - In order to obtain a permit:
  - Facilities with interim status must file a part B RCRA permit application when directed to do so by EPA statute or an authorized State and final facility standards must be met or the facility must be on an approved schedule to meet those standards.

The EPA-authorized States are to issue permits or deny the application by November 8, 1988 for land disposal facilities; by November 8, 1989 for incinerators; and by November 8, 1992 for other facilities. The following is a statutory schedule for termination of interim status.

Facility	Interim Status Terminates	Unless Part B Submitted
Land Disposal	November 1985	November 1985
Incinerators	November 1989	November 1986
Other facilities	November 1992	November 1988

-New facilities and facilities which do not qualify for interim status are to receive a RCRA permit before construction can begin or a hazardous waste can be handled.

- Used/Recycled Oil - Used oil burned for energy recovery is regulated under - 40 CFR Part 266. Although a number of parallel off-spec due to flashpoint, metal or halogen content. Additional regulations governing used/recycled oil are being developed.

- Underground Storage Tanks - The 1984 amendments also will cause certain underground storage tanks to be regulated. By May 8, 1986, all owners of underground tanks are to notify the designated State or local agency of the existence of the tank and specify the following:
  - Age
  - Size
  - Type
  - Location
  - Uses

For tanks taken out of operation after January 1, 1974, the owner is to also notify the designated State or local agency of the existence of the tank and specify the following:

- Date the tank was taken out of operation
- Age at that time
- Size
- Type
- Location
- Type and quantity of substance left in the tank

Rules comprehensively regulating these tanks were proposed April 17, 1987, 52 Federal Register 12662.

COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT (SUPERFUND)

The Superfund Act was enacted December 11, 1980. The Federal government is authorized to clean up toxic or hazardous contaminants at closed and abandoned hazardous waste dumps and the government is permitted to recover cost of this cleanup and associated damages by suing the responsible parties involved. Cleanup monies will come out of a "superfund" created by taxes on chemicals and hazardous wastes.

The act provides that, when there is a release of hazardous substance, either real or threatened, the parties who operated the vessel or facility which created the release are liable for the containment, removal, remedial action, response and injury damages to natural resources under Section 107(a). The act also establishes limitations on liability.

If claims are presented to the liable parties but are not satisfied, the act then allows claims to be reimbursed from the Superfund.

Regulatory provisions under Sections 102 and 103 of the act require that release of hazardous substances into the environment be reported unless the release is in accordance with an established permit. Spills of any "reportable quantity", established pursuant to regulations promulgated under the Act, must be reported.

All owners or operators of any facility handling and disposing of hazardous substances or that has handled hazardous substances in the past (including previous owners and operators) were required to inform the EPA Administrator by June 1981 of their facility activities unless they have a permit or have been accorded "interim status". Failure of notification is a crime and, if the party knowingly fails to provide these data, they are not entitled to the prescribed limits and defenses of liability.

On October 17, 1986, the Superfund Act was amended under the Superfund Amendments and Reauthorization Act (SARA). Those amendments provide mandatory schedules for the completion of various phases of remedial response activities, establish detailed cleanup standards and generally strengthen existing authority to effect the cleanup of superfund sites.

(An integral part of SARA, but not an amendment to the Superfund Act is the Emergency Planning and Community Right-to-Know Act of 1986. It addresses the handling of extremely hazardous chemicals and requires: (1) Emergency planning, (2) emergency notification, (3) community right-to-know reporting and (4) an emissions inventory.)

TOXIC SUBSTANCES CONTROL ACT (TSCA)

Under TSCA EPA can regulate existing and new chemical substances and mixtures. Persons who manufacture (the term manufacture includes import), process, distribute in commerce, use, or dispose of chemical substances or mixtures (chemicals) can be required to submit information and to conduct tests, and their activities can be limited as follows:

Inventory and Premanufacture Notification

Under section 8(b) of TSCA, EPA publishes and maintains an inventory of chemical substances in commerce. A substance not on that inventory is a "new chemical substance," and no person may manufacture that substance for nonexempt commercial purposes unless the person has submitted a notice to EPA at least 90 days before the person intends to begin manufacture (section 5(a)). If EPA does not take action during its 90-day review of the premanufacture notice (PMN) to prohibit manufacture, the person is free to begin. Once the substance is actually manufactured, it is placed on the inventory and is no longer subject to PMN requirements. If EPA determines during the 90-day review that there is insufficient information to permit a reasoned evaluation of the effects of the new substance, and either that activities involving the substance may present an unreasonable risk of injury or that the substance will be produced in substantial quantities and enters or is reasonably anticipated to enter the environment in substantial quantities or there may be significant or substantial human exposure to it, the Agency may issue an administrative order prohibiting or limiting manufacture, processing, distribution, use, or disposal of the substance pending development of sufficient data (section 5(e)). Where there is sufficient data to determine that activities involving the new substance will present an unreasonable risk of injury, EPA can ban manufacture through an administrative order or can

119

otherwise limit manufacture, processing, distribution, use, or disposal through an immediately effective section 6 rule (section 5(f)). Most regulation of new substances takes place through consent orders under section 5(e).

Testing

Under section 4 of TSCA, EPA can issue rules requiring manufacturers and processors of chemicals to test those chemicals for health and environmental effects. To require testing, EPA must find that there is insufficient information to determine or predict the effects of the chemical and either that activities involving the chemical may present an unreasonable risk of injury to health or the environment or that the chemical is or will be produced in substantial quantities and enters or may be reasonably anticipated to enter the environment in substantial quantities or there is or may be significant or substantial human exposure to it. The test rule prescribes the test standards for performing the required testing.

Reporting and Recordkeeping

Under section 8(a) of TSCA, EPA can issue rules requiring persons who manufaccure or process chemicals to make reports or keep records concerning those chemicals and the persons' activities. In some cases small businesses are exempt from these requirements. EPA has issued several rules under section 8(a) including the Preliminary Assessment Information Rule (40 CFR Part 712) and the Inventory Update Rule (40 CFR Part 710). EPA has proposed a Comprehensive Assessment Information Rule (CAIR) which will require additional information.

Section 8(c) authorizes EPA by rule to require persons who manufacture, process, or distribute in commerce chemicals to maintain records of significant adverse reactions to health or the environment alleged to have been caused by the chemicals and to submit copies of those records to EPA upon request EPA has issued a general section 8(c) rule (40 CFR Part 717). Section 8(d) authorizes EPA by rule to require person who manufacture, process, or distribute in commerce chemicals to submit lists of health and safety studies for such chemicals conducted by the them, known to them, or reasonably ascertainable by them and to submit copies of any such studies. EPA has issued rules requiring submission of such lists and studies for some chemicals (40 CFR Part 716).

Section 8(e) requires persons who manufacture, process, or distribute in commerce chemicals who obtain information supportin the conclusions that those chemicals present a substantial risk of injury to health or the environment to immediately inform EPA.

EPA issued an interpretive policy statement for section 8(e) in the Federal Register March 16, 1978 (43 FR 11110).

Regulation Under Section 6

Under section 6 of TSCA EPA can issue rules prohibiting or limiting manufacture, processing, distribution in commerce, use or disposal of chemical. To do so, EPA must find that the activities involving the chemical will present an unreasonable risk of injury to health or the environment. Regulatory action can range from labelling to bans on manufacture or use. EPA has issued such rules for CFCs, asbestos, and certain chemicals used in metal working fluids (40 CFR Parts 747, 762, and 763). Section 6(e) specifically addresses PCBs and bans further manufacture. processing, distribution in commerce, and use of PCBs other than in a totally enclosed manner unless EPA grants an exemption. EPA is also required to regulate disposal of PCBs. EPA has issued comprehensive PCB rules (40 CFR Part 761).

Imminent Hazards

Under section 7 of TSCA, EPA is authorized to bring an action in a U.S. district court for seizure of an imminently hazardous chemical or an article containing it, for relief against a person who manufactures, processes, distributes in commerce, uses, or disposes of an imminently hazardous chemical or an article containing it, or for both. An imminently hazardous chemical is one which presents an imminent and unreasonable risk of serious or widespread injury to health or the environment which is likely to result before EPA could act to issue a final rule under section 6 of TSCA. Relief can include notification to purchasers, public notice, recall, replacement or repurchase, or any combination of these.

SAFE DRINKING WATER ACT

The SDWA of 1974 was established to provide safe drinking water to the public. Both primary and secondary drinking water standards have been set by EPA regulations which apply to water provided by public water systems. National Interim Primary Drinking Water REgulations were adopted in 1975 to protect public health (40 CFR Part 141). Regulations covering radionuclides were added in 1976. Regulations for trihalomethanes were promulgated in 1979. Secondary regulations were established in 1979 as guidelines to STates to protect the non-health-related qualities of drinking water. The 1986 amendments to the SDWA: (1) establish a mandatory schedule, requiring the promulgation of primary drinking water regulations for 83 contaminants, (2) prohibit the use of lead in public water systems, (3† provide civil and criminal penalties for persons who tamper with public water systems and (4† allow closer scrutiny of State programs, including the direct enforcement of drinking water standards, if necessary.

The SDWA also provides for protection of underground sources of drinking water. Final regulations have been issued whereby States are to establish Underground Injection Control (UIC) to prevent endangerment of any underground source of drinking water from injection activity. Injection wells are divided by regulation into five classes. Construction and operation standards are established for Class I, II and III wells. Class I and Class IV hazardous waste wells are also subject to RCRA requirements. Class IV wells are those used by generators of hazardous or radioactive wastes to dispose of hazardous wastes into formations within one quarter mile of an underground source of drinking water. Injection into such wells is prohibited by section 7010 of RCRA. There are numerous State regulatory requirements affecting groundwater which should be consulted by multi-media compliance inspectors. In addition, the 1986 amendments to SDWA to strengthen EPA's enforcement authority for UIC programs.

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE CT (FIFRA)

FIFRA establishes EPA's authority over the sale, distribution, and use of pesticide products, and has as a primary objective the protection of human health and the environment. A pesticide is any substance or mixture of substances intended to prevent, destroy, repel, or mitigate any pest, or which is intended for use as a plant regulator, defoliant, or desiccant. Pesticide registration and the requirements associated with it are at the core of virtually all actions taken under FIFRA.

As a general matter FIFRA requires all pesticides sold or distributed in commerce to be regulated by EPA. The statutory standard for registration requires, among other things, that a pesticide perform the intended function without causing "unreasonable adverse effects on the environment." The term "unreasonable adverse effects on the environment" is defined as "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of use" of the pesticide.

In order to ensure compliance with the statutory standard, FIFRA authorizes, among other things, production of health and safety data, EPA oversight of pesticide experiments, restrictions on pesticide use and composition, applicator certification, mandatory reporting requirements, and periodic inspection of establishments. Pesticide products must be labeled to specify ingredients, permitted uses, warnings, registration number, and any special use restrictions. Regulations promulgated under FIFRA further detail the requirements imposed by the statute and the necessary procedures for compliance. Where appropriate, pesticide registration may also require the setting of residue tolerances under the Federal Food, Drug, and Cosmetic Act, which are enforced by the Food and Drug Administration. As described in sections 3 and 6 of FIFRA, failure to comply with the statutory standard for registration can result in the suspension and/or cancellation of a pesticide's registration. Section 14 of FIFRA sets out the penalties for failure to comply with other requirements of the statute and its regulations; section 12 lists the unlawful acts under FIFRA. Both civil and criminal penalties may be imposed for these violations. In some instances, penalties may vary depending upon whether the violator is a private or commercial entity. Judicial review of EPA actions under FIFRA is addressed in section 16, and includes review in both the district court and the court of appeals (following a public hearing).

A few pesticides are also regulated as toxic pollutants under section 307(a) of the CWA and by Primary Drinking Water Standards under the SDWA.

APPENDIX B

EXECUTIVE ORDERS 12088, 12146, AND 12580

presidential documents

[3195-01-M]

Title 3—The President

Executive Order 12088

October 13, 1978

Federal Compliance With Pollution Control Standards

By the authority vested in me as President by the Constitution and statutes of the United States of America, including Section 22 of the Toxic Substances Control Act (15 U.S.C. 2621), Section 313 of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1323), Section 1447 of the Public Health Service Act, as amended by the Safe Drinking Water Act (42 U.S.C. 300j–6), Section 118 of the Clean Air Act, as amended (42 U.S.C. 7418(b)), Section 4 of the Noise Control Act of 1972 (42 U.S.C. 4903), Section 6001 of the Solid Waste Disposal Act, as amended (42 U.S.C. 6961), and Section 301 of Title 3 of the United States Code, and to ensure Federal compliance with applicable pollution control standards, it is hereby ordered as follows:

1-1. *Applicability of Pollution Control Standards.*

1-101. The head of each Executive agency is responsible for ensuring that all necessary actions are taken for the prevention, control, and abatement of environmental pollution with respect to Federal facilities and activities under the control of the agency.

1-102. The head of each Executive agency is responsible for compliance with applicable pollution control standards, including those established pursuant to, but not limited to, the following:

(a) Toxic Substances Control Act (15 U.S.C. 2601 *et seq.*).

(b) Federal Water Pollution Control Act, as amended (33 U.S.C. 1251 *et seq.*).

(c) Public Health Service Act, as amended by the Safe Drinking Water Act (42 U.S.C. 300f *et seq.*).

(d) Clean Air Act, as amended (42 U.S.C. 7401 *et seq.*).

(e) Noise Control Act of 1972 (42 U.S.C. 4901 *et seq.*).

(f) Solid Waste Disposal Act, as amended (42 U.S.C. 6901 *et seq.*).

(g) Radiation guidance pursuant to Section 274(h) of the Atomic Energy Act of 1954, as amended (42 U.S.C. 2021(h); see also, the Radiation Protection Guidance to Federal Agencies for Diagnostic X Rays approved by the President on January 26, 1978 and published at page 4377 of the FEDERAL REGISTER on February 1, 1978).

(h) Marine Protection, Research, and Sanctuaries Act of 1972, as amended (33 U.S.C. 1401, 1402, 1411–1421, 1441–1444 and 16 U.S.C. 1431–1434).

(i) Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 *et seq.*).

1-103. "Applicable pollution control standards" means the same substantive, procedural, and other requirements that would apply to a private person.

1-2. *Agency Coordination.*

1-201. Each Executive agency shall cooperate with the Administrator of the Environmental Protection Agency, hereinafter referred to as the Adminis-

Reproduced from
best available copy.

trator, and State, interstate, and local agencies in the prevention, control, and abatement of environmental pollution.

1-202. Each Executive agency shall consult with the Administrator and with State, interstate, and local agencies concerning the best techniques and methods available for the prevention, control, and abatement of environmental pollution.

1-3. *Technical Advice and Oversight.*

1-301. The Administrator shall provide technical advice and assistance to Executive agencies in order to ensure their cost effective and timely compliance with applicable pollution control standards.

1-302. The administrator shall conduct such reviews and inspections as may be necessary to monitor compliance with applicable pollution control standards by Federal facilities and activities.

1-4. *Pollution Control Plan.*

1-401. Each Executive agency shall submit to the Director of the Office of Management and Budget, through the Administrator, an annual plan for the control of environmental pollution. The plan shall provide for any necessary improvement in the design, construction, management, operation, and maintenance of Federal facilities and activities, and shall include annual cost estimates. The Administrator shall establish guidelines for developing such plans.

1-402. In preparing its plan, each Executive agency shall ensure that the plan provides for compliance with all applicable pollution control standards.

1-403. The plan shall be submitted in accordance with any other instructions that the Director of the Office of Management and Budget may issue.

1-5. *Funding.*

1-501. The head of each Executive agency shall ensure that sufficient funds for compliance with applicable pollution control standards are requested in the agency budget.

1-502. The head of each Executive agency shall ensure that funds appropriated and apportioned for the prevention, control and abatement of environmental pollution are not used for any other purpose unless permitted by law and specifically approved by the Office of Management and Budget.

1-6. *Compliance With Pollution Controls.*

1-601. Whenever the Administrator or the appropriate State, interstate, or local agency notifies an Executive agency that it is in violation of an applicable pollution control standard (see Section 1-102 of this Order), the Executive agency shall promptly consult with the notifying agency and provide for its approval a plan to achieve and maintain compliance with the applicable pollution control standard. This plan shall include an implementation schedule for coming into compliance as soon as practicable.

1-602. The Administrator shall make every effort to resolve conflicts regarding such violation between Executive agencies and, on request of any party, such conflicts between an Executive agency and a State, interstate, or a local agency. If the Administrator cannot resolve a conflict, the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict.

1-603. The Director of the Office of Management and Budget shall consider unresolved conflicts at the request of the Administrator. The Director shall seek the Administrator's technological judgment and determination with regard to the applicability of statutes and regulations.

1-604. These conflict resolution procedures are in addition to, not in lieu of, other procedures, including sanctions, for the enforcement of applicable pollution control standards.

1-605. Except as expressly provided by a Presidential exemption under this Order, nothing in this Order, nor any action or inaction under this Order, shall be construed to revise or modify any applicable pollution control standard.

1-7. *Limitation on Exemptions.*

1-701. Exemptions from applicable pollution control standards may only be granted under statutes cited in Section 1-102(a) through 1-102(f) if the President makes the required appropriate statutory determination: that such exemption is necessary (a) in the interest of national security, or (b) in the paramount interest of the United States.

1-702. The head of an Executive agency may, from time to time, recommend to the President through the Director of the Office of Management and Budget, that an activity or facility, or uses thereof, be exempt from an applicable pollution control standard.

1-703. The Administrator shall advise the President, through the Director of the Office of Management and Budget, whether he agrees or disagrees with a recommendation for exemption and his reasons therefor.

1-704. The Director of the Office of Management and Budget must advise the President within sixty days of receipt of the Administrator's views.

1-8. *General Provisions.*

1-801. The head of each Executive agency that is responsible for the construction or operation of Federal facilities outside the United States shall ensure that such construction or operation complies with the environmental pollution control standards of general applicability in the host country or jurisdiction.

1-802. Executive Order No. 11752 of December 17, 1973, is revoked.

Jimmy Carter

THE WHITE HOUSE,
October 13, 1978.

[FR Doc. 78-29406 Filed 10-13-78; 3:40 pm]

EDITORIAL NOTE: The President's statement of Oct. 13, 1978, on signing Executive Order 12088 and his memorandum for the heads of departments and agencies, dated Oct. 13, 1978, on Federal compliance with pollution control standards are printed in the Weekly Compilation of Presidential Documents (vol. 14, no. 41).

Presidential Documents

Executive Order 12146 of July 18, 1979

Management of Federal Legal Resources

By the authority vested in me as President by the Constitution and statutes of the United States of America, it is hereby ordered as follows:

1.1. *Establishment of the Federal Legal Council.*

1–101. There is hereby established the Federal Legal Council, which shall be composed of the Attorney General and the representatives of not more than 15 other agencies. The agency representative shall be designated by the head of the agency.

1–102. The initial membership of the Council, in addition to the Attorney General, shall consist of representatives designated by the heads of the following agencies:

(a) The Department of Commerce.

(b) The Department of Defense.

(c) The Department of Energy.

(d) The Environmental Protection Agency.

(e) The Equal Employment Opportunity Commission.

(f) The Federal Trade Commission.

(g) The Department of Health, Education, and Welfare.

(h) The Interstate Commerce Commission.

(i) The Department of Labor.

(j) The National Labor Relations Board.

(k) The Securities and Exchange Commission.

(l) The Department of State.

(m) The Department of the Treasury.

(n) The United States Postal Service and

(o) the Veterans Administration.

1–103. The initial members of the Council shall serve for a term of two years. Thereafter, the agencies which compose the membership shall be designated annually by the Council and at least five positions on the Council, other than that held by the Attorney General, shall rotate annually.

1–104. In addition to the above members, the Directors of the Office of Management and Budget and the Office of Personnel Management, or their designees, shall be advisory members of the Council.

1–105. The Attorney General shall chair the Council and provide staff for its operation. Representatives of agencies that are not members of the Council may serve on or chair subcommittees of the Council.

1–2. *Functions of the Council.*

1–201. The Council shall promote:

(a) coordination and communication among Federal legal offices;

(b) improved management of Federal lawyers, associated support personnel, and information systems;

(c) improvements in the training provided to Federal lawyers;

(d) the facilitation of the personal donation of *pro bono* legal services by Federal attorneys;

(e) the use of joint or shared legal facilities in field offices; and

(f) the delegation of legal work to field offices.

1–202. The Council shall study and seek to resolve problems in the efficient and effective management of Federal legal resources that are beyond the capacity or authority of individual agencies to resolve.

1–203. The Council shall develop recommendations for legislation and other actions: (a) to increase the efficient and effective operation and management of Federal legal resources, including those matters specified in Section 1–201, and (b) to avoid inconsistent or unnecessary litigation by agencies.

1–3. *Litigation Notice System.*

1–301. The Attorney General shall establish and maintain a litigation notice system that provides timely information about all civil litigation pending in the courts in which the Federal Government is a party or has a significant interest.

1–302. The Attorney General shall issue rules to govern operation of the notice system. The rules shall include the following requirement:

(a) All agencies with authority to litigate cases in court shall promptly notify the Attorney General about those cases that fall in classes or categories designated from time to time by the Attorney General.

(b) The Attorney General shall provide all agencies reasonable access to the information collected in the litigation notice system.

1–4. *Resolution of Interagency Legal Disputes.*

1–401. Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.

1–402. Whenever two or more Executive agencies whose heads serve at the pleasure of the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.

1–5. *Access to Legal Opinions.*

1–501. In addition to the disclosure now required by law, all agencies are encouraged to make available for public inspection and copying other opinions of their legal officers that are statements of policy or interpretation that have been adopted by the agency, unless the agency determines that disclosure would result in demonstrable harm.

1–502. All agencies are encouraged to make available on request other legal opinions, when the agency determines that disclosure would not be harmful.

1–6. *Automated Legal Research and Information Systems.*

1–601. The Attorney General, in coordination with the Secretary of Defense and other agency heads, shall provide for a computerized legal research system that will be available to all Federal law offices on a reimbursable basis. The system may include in its data base such Federal regulations, case briefs, and legal opinions, as the Attorney General deems appropriate.

1–602. The Federal Legal Council shall provide leadership for all Federal legal offices in establishing appropriate word processing and management information systems.

1–7. *Responsibilities of the Agencies.*

1–701. Each agency shall (a) review the management and operation of its legal activities and report in one year to the Federal Legal Council all steps being taken to improve those operations, and (b) cooperate with the Federal Legal Council and the Attorney General in the performance of the functions provided by this Order.

1–702. To the extent permitted by law, each agency shall furnish the Federal Legal Council and the Attorney General with reports, information and assistance as requested to carry out the provisions of this Order.

Jimmy Carter

THE WHITE HOUSE,
July 18, 1979.

[FR Doc. 79-22727
Filed 7-19-79; 10:40 am]
Billing code 3195-01-M

Presidential Documents

Executive Order 12580 of January 23, 1987

Superfund Implementation

By the authority vested in me as President of the United States of America by Section 115 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9615 *et seq.*) ("the Act"), and by Section 301 of Title 3 of the United States Code, it is hereby ordered as follows:

Section 1. *National Contingency Plan.* (a)(1) The National Contingency Plan ("the NCP"), shall provide for a National Response Team ("the NRT") composed of representatives of appropriate Federal departments and agencies for national planning and coordination of preparedness and response actions, and regional response teams as the regional counterpart to the NRT for planning and coordination of regional preparedness and response actions.

(2) The following agencies (in addition to other appropriate agencies) shall provide representatives to the National and Regional Response Teams to carry out their responsibilities under the NCP: Department of State, Department of Defense, Department of Justice, Department of the Interior, Department of Agriculture, Department of Commerce, Department of Labor, Department of Health and Human Services, Department of Transportation, Department of Energy, Environmental Protection Agency, Federal Emergency Management Agency, United States Coast Guard, and the Nuclear Regulatory Commission.

(3) Except for periods of activation because of a response action, the representative of the Environmental Protection Agency ("EPA") shall be the chairman and the representative of the United States Coast Guard shall be the vice chairman of the NRT and these agencies' representatives shall be co-chairs of the Regional Response Teams ("the RRTs"). When the NRT or an RRT is activated for a response action, the chairman shall be the EPA or United States Coast Guard representative, based on whether the release or threatened release occurs in the inland or coastal zone, unless otherwise agreed upon by the EPA and United States Coast Guard representatives.

(4) The RRTs may include representatives from State governments, local governments (as agreed upon by the States), and Indian tribal governments. Subject to the functions and authorities delegated to Executive departments and agencies in other sections of this Order, the NRT shall provide policy and program direction to the RRTs.

(b)(1) The responsibility for the revision of the NCP and all of the other functions vested in the President by Sections 105(a), (b), (c), and (g), 125, and 301(f) of the Act is delegated to the Administrator of the Environmental Protection Agency ("the Administrator").

(2) The function vested in the President by Section 118(p) of the Superfund Amendments and Reauthorization Act of 1986 (Public Law 99–499) ("SARA") is delegated to the Administrator.

(c) In accord with Section 107(f)(2)(A) of the Act and Section 311(f)(5) of the Federal Water Pollution Control Act, as amended (33 U.S.C. 1321(f)(5)), the following shall be among those designated in the NCP as Federal trustees for natural resources:

(1) Secretary of Defense;

(2) Secretary of the Interior;

(3) Secretary of Agriculture;

(4) Secretary of Commerce;

(5) Secretary of Energy.

(d) Revisions to the NCP shall be made in consultation with members of the NRT prior to publication for notice and comment. Revisions shall also be made in consultation with the Director of the Federal Emergency Management Agency and the Nuclear Regulatory Commission in order to avoid inconsistent or duplicative requirements in the emergency planning responsibilities of those agencies.

(e) All revisions to the NCP, whether in proposed or final form, shall be subject to review and approval by the Director of the Office of Management and Budget ("OMB").

Sec. 2. *Response and Related Authorities.* (a) The functions vested in the President by the first sentence of Section 104(b)(1) of the Act relating to "illness, disease, or complaints thereof" are delegated to the Secretary of Health and Human Services who shall, in accord with Section 104(i) of the Act, perform those functions through the Public Health Service.

(b) The functions vested in the President by Sections 104(e)(7)(C), 113(k)(2), 119(c)(7), and 121(f)(1) of the Act, relating to promulgation of regulations and guidelines, are delegated to the Administrator, to be exercised in consultation with the NRT.

(c)(1) The functions vested in the President by Sections 104(a) and the second sentence of 126(b) of the Act, to the extent they require permanent relocation of residents, businesses, and community facilities or temporary evacuation and housing of threatened individuals not otherwise provided for, are delegated to the Director of the Federal Emergency Management Agency.

(2) Subject to subsection (b) of this Section, the functions vested in the President by Sections 117(a) and (c), and 119 of the Act, to the extent such authority is needed to carry out the functions delegated under paragraph (1) of this subsection, are delegated to the Director of the Federal Emergency Management Agency.

(d) Subject to subsections (a), (b) and (c) of this Section, the functions vested in the President by Sections 104(a), (b) and (c)(4), 113(k), 117(a) and (c), 119, and 121 of the Act are delegated to the Secretaries of Defense and Energy, with respect to releases or threatened releases where either the release is on or the sole source of the release is from any facility or vessel under the jurisdiction, custody or control of their departments, respectively, including vessels bare-boat chartered and operated. These functions must be exercised consistent with the requirements of Section 120 of the Act.

(e)(1) Subject to subsections (a), (b), (c), and (d) of this Section, the functions vested in the President by Sections 104(a), (b), and (c)(4), and 121 of the Act are delegated to the heads of Executive departments and agencies, with respect to remedial actions for releases or threatened releases which are not on the National Priorities List ("the NPL") and removal actions other than emergencies, where either the release is on or the sole source of the release is from any facility or vessel under the jurisdiction, custody or control of those departments and agencies, including vessels bare-boat chartered and operated. The Administrator shall define the term "emergency", solely for the purposes of this subsection, either by regulation or by a memorandum of understanding with the head of an Executive department or agency.

(2) Subject to subsections (b), (c), and (d) of this Section, the functions vested in the President by Sections 104(b)(2), 113(k), 117(a) and (c), and 119 of the Ac are delegated to the heads of Executive departments and agencies, w respect to releases or threatened releases where either the release is on o sole source of the release is from any facility or vessel under the jurisd

custody or control of those departments and agencies, including vessels bareboat chartered and operated.

(f) Subject to subsections (a), (b), (c), (d), and (e) of this Section, the functions vested in the President by Sections 104(a), (b) and (c)(4), 113(k), 117(a) and (c), 119, and 121 of the Act are delegated to the Secretary of the Department in which the Coast Guard is operating ("the Coast Guard"), with respect to any release or threatened release involving the coastal zone, Great Lakes waters, ports, and harbors.

(g) Subject to subsections (a), (b), (c), (d), (e), and (f) of this Section, the functions vested in the President by Sections 101(24), 104(a), (b), (c)(4) and (c)(9), 113(k), 117(a) and (c), 119, 121, and 126(b) of the Act are delegated to the Administrator. The Administrator's authority under Section 119 of the Act is retroactive to the date of enactment of SARA.

(h) The functions vested in the President by Section 104(c)(3) of the Act are delegated to the Administrator, with respect to providing assurances for Indian tribes, to be exercised in consultation with the Secretary of the Interior.

(i) Subject to subsections (d), (e), (f), (g) and (h) of this Section, the functions vested in the President by Section 104(c) and (d) of the Act are delegated to the Coast Guard, the Secretary of Health and Human Services, the Director of the Federal Emergency Management Agency, and the Administrator in order to carry out the functions delegated to them by this Section.

(j)(1) The functions vested in the President by Section 104(e)(5)(A) are delegated to the heads of Executive departments and agencies, with respect to releases or threatened releases where either the release is on or the sole source of the release is from any facility or vessel under the jurisdiction, custody or control of those departments and agencies, to be exercised with the concurrence of the Attorney General.

(2) Subject to subsection (b) of this Section and paragraph (1) of this subsection, the functions vested in the President by Section 104(e) are delegated to the heads of Executive departments and agencies in order to carry out their functions under this Order or the Act.

(k) The functions vested in the President by Section 104(f), (g), (h), (i)(11), and (j) of the Act are delegated to the heads of Executive departments and agencies in order to carry out the functions delegated to them by this Section. The exercise of authority under Section 104(h) of the Act shall be subject to the approval of the Administrator of the Office of Federal Procurement Policy.

Sec. 3. *Cleanup Schedules.* (a) The functions vested in the President by Sections 116(a) and the first two sentences of 105(d) of the Act are delegated to the heads of Executive departments and agencies with respect to facilities under the jurisdiction, custody or control of those departments and agencies.

(b) Subject to subsection (a) of this Section, the functions vested in the President by Sections 116 and 105(d) are delegated to the Administrator.

Sec. 4. *Enforcement.* (a) The functions vested in the President by Sections 109(d) and 122(e)(3)(A) of the Act, relating to development of regulations and guidelines, are delegated to the Administrator, to be exercised in consultation with the Attorney General.

(b)(1) Subject to subsection (a) of this Section, the functions vested in the President by Section 122 (except subsection (b)(1)) are delegated to the heads of Executive departments and agencies, with respect to releases or threatened releases not on the NPL where either the release is on or the sole source of the release is from any facility under the jurisdiction, custody or control of those Executive departments and agencies. These functions may be exercised only with the concurrence of the Attorney General.

(2) Subject to subsection (a) of this Section, the functions vested in the President by Section 109 of the Act, relating to violations of Section 122 of the Act, are delegated to the heads of Executive departments and agencies, with

respect to releases or threatened releases not on the NPL where either the release is on or the sole source of the release is from any facility under the jurisdiction, custody or control of those Executive departments and agencies. These functions may be exercised only with the concurrence of the Attorney General.

(c)(1) Subject to subsection (a) and (b)(1) of this Section, the functions vested in the President by Sections 106(a) and 122 of the Act are delegated to the Coast Guard with respect to any release or threatened release involving the coastal zone, Great Lakes waters, ports, and harbors.

(2) Subject to subsection (a) and (b)(2) of this Section, the functions vested in the President by Section 109 of the Act, relating to violations of Sections 103 (a) and (b), and 122 of the Act, are delegated to the Coast Guard with respect to any release or threatened release involving the coastal zone, Great Lakes waters, ports, and harbors.

(d)(1) Subject to subsections (a), ~~(b)(1)~~, and (c)(1) of this Section, the functions vested in the President by Sections 106 and 122 of the Act are delegated to the Administrator.

(2) Subject to subsections (a), (b)(2), and (c)(2) of this Section, the functions vested in the President by Section 109 of the Act, relating to violations of Sections 103 and 122 of the Act, are delegated to the Administrator.

(e) Notwithstanding any other provision of this Order, the authority under Sections 104(e)(5)(A) and 106(a) of the Act to seek information, entry, inspection, samples, or response actions from Executive departments and agencies may be exercised only with the concurrence of the Attorney General.

Sec. 5. *Liability.* (a) The function vested in the President by Section 107(c)(1)(C) of the Act is delegated to the Secretary of Transportation.

(b) The functions vested in the President by Section 107(c)(3) of the Act are delegated to the Coast Guard with respect to any release or threatened release involving the coastal zone, Great Lakes waters, ports, and harbors.

(c) Subject to subsection (b) of this Section, the functions vested in the President by Section 107(c)(3) of the Act are delegated to the Administrator.

(d) The functions vested in the President by Section 107(f)(1) of the Act are delegated to each of the Federal trustees for natural resources designated in the NCP for resources under their trusteeship.

(e) The functions vested in the President by Section 107(f)(2)(B) of the Act, to receive notification of the state natural resource trustee designations, are delegated to the Administrator.

Sec. 6. *Litigation.* (a) Notwithstanding any other provision of this Order, any representation pursuant to or under this Order in any judicial proceedings shall be by or through the Attorney General. The conduct and control of all litigation arising under the Act shall be the responsibility of the Attorney General.

(b) Notwithstanding any other provision of this Order, the authority under the Act to require the Attorney General to commence litigation is retained by the President.

(c) The functions vested in the President by Section 113(g) of the Act, to receive notification of a natural resource trustee's intent to file suit, are delegated to the heads of Executive departments and agencies with respect to response actions for which they have been delegated authority under Section 2 of this Order. The Administrator shall promulgate procedural regulations for providing such notification.

(d) The functions vested in the President by Sections 310 (d) and (e) of the Act, relating to promulgation of regulations, are delegated to the Administrator.

Sec. 7. *Financial Responsibility.* (a) The functions vested in the President by Section 107(k)(4)(B) of the Act are delegated to the Secretary of the Treasury.

The Administrator will provide the Secretary with such technical information and assistance as the Administrator may have available.

(b)(1) The functions vested in the President by Section 108(a)(1) of the Act are delegated to the Coast Guard.

(2) Subject to Section 4(a) of this Order, the functions vested in the President by Section 109 of the Act, relating to violations of Section 108(a)(1) of the Act, are delegated to the Coast Guard.

(c)(1) The functions vested in the President by Section 108(b) of the Act are delegated to the Secretary of Transportation with respect to all transportation related facilities, including any pipeline, motor vehicle, rolling stock, or aircraft.

(2) Subject to Section 4(a) of this Order, the functions vested in the President by Section 109 of the Act, relating to violations of Section 108(a)(3) of the Act, are delegated to the Secretary of Transportation.

(3) Subject to Section 4(a) of this Order, the functions vested in the President by Section 109 of the Act, relating to violations of Section 108(b) of the Act, are delegated to the Secretary of Transportation with respect to all transportation related facilities, including any pipeline, motor vehicle, rolling stock, or aircraft.

(d)(1) Subject to subsection (c)(1) of this Section, the functions vested in the President by Section 108 (a)(4) and (b) of the Act are delegated to the Administrator.

(2) Subject to Section 4(a) of this Order and subsection (c)(3) of this Section, the functions vested in the President by Section 109 of the Act, relating to violations of Section 108 (a)(4) and (b) of the Act, are delegated to the Administrator.

Sec. 8. *Employee Protection and Notice to Injured.* (a) The functions vested in the President by Section 110(e) of the Act are delegated to the Adminstrator.

(b) The functions vested in the President by Section 111(g) of the Act are delegated to the Secretaries of Defense and Energy with respect to releases from facilities or vessels under the jurisdiction, custody or control of their departments, respectively, including vessels bare-boat chartered and operated.

(c) Subject to subsection (b) of this Section, the functions vested in the President by Section 111(g) of the Act are delegated to the Administrator.

Sec. 9. *Management of the Hazardous Substance Superfund and Claims.* (a) The functions vested in the President by Section 111(a) of the Act are delegated to the Administrator, subject to the provisions of this Section and other applicable provisions of this Order.

(b) The Administrator shall transfer to other agencies, from the Hazardous Substance Superfund out of sums appropriated, such amounts as the Administrator may determine necessary to carry out the purposes of the Act. These amounts shall be consistent with the President's Budget, within the total approved by the Congress, unless a revised amount is approved by OMB. Funds appropriated specifically for the Agency for Toxic Substances and Disease Registry ("ATSDR"), shall be directly transferred to ATSDR, consistent with fiscally responsible investment of trust fund money.

(c) The Administrator shall chair a budget task force composed of representatives of Executive departments and agencies having responsibilities under this Order or the Act. The Administrator shall also, as part of the budget request for the Environmental Protection Agency, submit to OMB a budget for the Hazardous Substance Superfund which is based on recommended levels developed by the budget task force. The Administrator may prescribe reporting and other forms, procedures, and guidelines to be used by the agencies of the Task Force in preparing the budget request, consistent with budgetary reporting requirements issued by OMB. The Administrator shall prescribe forms to agency task force members for reporting the expenditure of funds on a site specific basis.

(d) The Administrator and each department and agency head to whom funds are provided pursuant to this Section, with respect to funds provided to them, are authorized in accordance with Section 111(f) of the Act to designate Federal officials who may obligate such funds.

(e) The functions vested in the President by Section 112 of the Act are delegated to the Administrator for all claims presented pursuant to Section 111 of the Act.

(f) The functions vested in the President by Section 111(o) of the Act are delegated to the Administrator.

(g) The functions vested in the President by Section 117(e) of the Act are delegated to the Administrator, to be exercised in consultation with the Attorney General.

(h) The functions vested in the President by Section 123 of the Act are delegated to the Administrator.

(i) Funds from the Hazardous Substance Superfund may be used, at the discretion of the Administrator or the Coast Guard, to pay for removal actions for releases or threatened releases from facilities or vessels under the jurisdiction, custody or control of Executive departments and agencies but must be reimbursed to the Hazardous Substance Superfund by such Executive department or agency.

Sec. 10. *Federal Facilities.* (a) When necessary, prior to selection of a remedial action by the Administrator under Section 120(e)(4)(A) of the Act, Executive agencies shall have the opportunity to present their views to the Administrator after using the procedures under Section 1-6 of Executive Order No. 12088 of October 13, 1978, or any other mutually acceptable process. Notwithstanding subsection 1-602 of Executive Order No. 12088, the Director of the Office of Management and Budget shall facilitate resolution of any issues.

(b) Executive Order No. 12088 of October 13, 1978, is amended by renumbering the current Section 1-802 as Section 1-803 and inserting the following new Section 1-802:

"1-802. Nothing in this Order shall create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or any person."

Sec. 11. *General Provisions.* (a) The function vested in the President by Section 101(37) of the Act is delegated to the Administrator.

(b)(1) The function vested in the President by Section 105(f) of the Act, relating to reporting on minority participation in contracts, is delegated to the Administrator.

(2) Subject to paragraph 1 of this subsection, the functions vested in the President by Section 105(f) of the Act are delegated to the heads of Executive departments and agencies in order to carry out the functions delegated to them by this Order. Each Executive department and agency shall provide to the Administrator any requested information on minority contracting for inclusion in the Section 105(f) annual report.

(c) The functions vested in the President by Section 126(c) of the Act are delegated to the Administrator, to be exercised in consultation with the Secretary of the Interior.

(d) The functions vested in the President by Section 301(c) of the Act are delegated to the Secretary of the Interior.

(e) Each agency shall have authority to issue such regulations as may be necessary to carry out the functions delegated to them by this Order.

Reproduced from best available copy.

(f) The performance of any function under this Order shall be done in consultation with interested Federal departments and agencies represented on the NRT, as well as with any other interested Federal agency.

(g) The following functions vested in the President by the Act which have been delegated or assigned by this Order may be redelegated to the head of any Executive department or agency with his consent: functions set forth in Sections 2 (except subsection (b)), 3, 4(b), 4(c), 4(d), 5(b), 5(c), and 8(c) of this Order.

(h) Executive Order No. 12316 of August 14, 1981, is revoked.

Ronald Reagan

THE WHITE HOUSE,
January 23, 1987.

[FR Doc. 87-1842
Filed 1-27-87; 2:35 pm]
Billing code 3195-01-M

APPENDIX C

EPA PROGRAM DEFINITIONS FOR MAJORS, MINORS, SIGNIFICANT NONCOMPLIERS AND SIGNIFICANT VIOLATORS

PROGRAM DEFINITIONS FOR SIGNIFICANT NONCOMPLIERS AND SIGNIFICANT VIOLATORS

Media Program		Term/Definition
Water/NPDES	o	Significant noncompliance under NPDES means the following instances of noncompliance by major dischargers: - Violations of conditions in enforcement orders except compliance schedules and reports. - Violations of compliance schedule milestones for starting construction, completing construction, and attaining final compliance by 90 days or more from the date of the milestone specified in an enforcement order or a permit. - Violations of permit effluent limits that exceed the Appendix A "Criteria for Noncompliance Reporting in the NPDES Program." - Failure to provide a compliance schedule report for final compliance or a monitoring report. - Violation of a permit limit; - An unauthorized bypass; - An unpermitted discharge; or - A pass-through of pollutants which causes or has the potential to cause a water quality problem or health problems.
PWSS	o	A significant noncomplier (SNC) is a community water system which meets any of the following criteria: - violates the microbiological MCL for 4 or more months during any 12 consecutive month period, or - violates the turbidity MCL for 4 or more months during any 12 consecutive month period, or

PROGRAM DEFINITIONS FOR SIGNIFICANT NONCOMPLIERS AND SIGNIFICANT VIOLATORS

Media Program	Term/Definition
PWSS (cont'd)	- is a "major" violator of the microbiological monitoring or reporting requirements for 12 consecutive months, or - is a "major" violator of the turbidity monitoring or reporting requirements for 12 consecutive months, or - is a "major" violator of the TTHM monitoring or reporting requirements for 12 consecutive months, or - violates the microbiological MCL and is a "major" violator of the microbiological monitoring requirements for a combined total of 12 consecutive months, or - violates the turbidity MCL and is a "major" violator of the turbidity monitoring requirements for a combined total of 12 consecutive months, or - exceeds the "unreasonable risk to health level" established for any of the regulated inorganic, organic (excluding TTHM), or radiological contaminants, or - exceeds the "unreasonable risk to health level" established for TTHM for 2 or more quarters during any 4 consecutive quarters, or - fails to monitor for, or report the results of, any inorganic, organic (other than TTHM), or radiological contaminant within one year after the end of the applicable compliance period during which the system was to have conducted the monitoring, or - violates a requirement of a "formal" compliance schedule prescribed by the State or EPA.

PROGRAM DEFINITIONS FOR SIGNIFICANT NONCOMPLIERS AND SIGNIFICANT VIOLATORS

Media Program	Term/Definition
UIC	° The term "significant noncompliance" for the UIC program means: - Violations as described in Section 144.8(a) and on EPA Form 7520-4 (6-83) by the owner/operator of a Class I or a Class IV well. - The following violations by the owner/operator of a Class II, III or V well: 1. Any unauthorized emplacement of fluids (where formal authorization is required); 2. Well operation without mechanical integrity which causes the movement of fluid outside the authorized zone of injection if such movement may have the potential for endangering an USDW judged according to the following criteria: a. The characteristics of the fluid released; b. The quantity of fluid released; and c. The relationship of the point of release to any USDW. Potential endangerment exists in cases where: (i) The release occurs above or into an USDW; or (ii) The release occurs below an USDW but the hydrogeology is such that fluids may be forced upward into the USDW.

PROGRAM DEFINITIONS FOR SIGNIFICANT NONCOMPLIERS AND SIGNIFICANT VIOLATORS

Media Program	Term/Definition
UIC (cont'd)	3. Well operation at an injection pressure that exceeds the permitted or authorized injection pressure and causes the movement of fluid outside the authorized zone of injection if such movement may have the potential for endangering an USDW. Potential endangerment exists. a. If the pressure in a tubingless well exceeds the MIT test pressure of the casing; or b. If the pressure exceeds the fracture pressure of the confining zone and the zone immediately above the confining zone is an USDW. 4. Failure to properly plug and abandon an injection well in any manner other than authorized; 5. Any violation of a formal enforcement action, including an administrative or judicial order, consent agreement, judgment or equivalent State action; 6. The knowing submission or use of any false information in a permit application, periodic report or special request for information about a well; and 7. Any other violation which the Director considers to be significant.

PROGRAM DEFINITIONS FOR SIGNIFICANT NONCOMPLIERS AND SIGNIFICANT VIOLATORS

Media Program	Term/Definition
Hazardous Waste/ RCRA	° Significant noncompliers are land disposal facilities with Class I violations of ground water monitoring, closure, post-closure or financial responsibility requirements. A Class I violation is defined as a violation that results in a release or serious threat of release of hazardous waste to the environment, or involves the failure to assure that ground water will be protected, that proper closure and post-closure activities will be undertaken, or that hazardous wastes will be destined for and delivered to permitted or interim status facilities.
Hazardous Waste/ CERCLA	° The Superfund equivalent of a significant noncomplier is those facilities on the National Priorities List (NPL) that will require remedial and/or removal actions.
Toxic Substances/ TSCA	° Significant noncompliance is a violation for which the enforcement action, is at minimum, an administrative complaint,* and includes but is not limited to the following: - Any PCB violation involving improper disposal, manufacturing, processing, distribution, improper use, storage, recordkeeping and/or marking violations. - Any PCB disposal resulting in contamination of surface or ground water, food or feeds.

---

* For Federal facilities, SNC is a violation, as defined here, that would normally result in an administrative complaint.

PROGRAM DEFINITIONS FOR SIGNIFICANT NONCOMPLIERS AND SIGNIFICANT VIOLATORS

Media Program	Term/Definition
TSCA, (cont'd)	- Any asbestos-in-schools violation involving failure to inspect, sample, analyze, post warnings, notify, and/or keep records where asbestos is present.
	- Any violation of testing requirements under TSCA Section 4.
	- Any violation of a premanufacturing notification under TSCA Section 5.
	- Any violation of TSCA Section 13 including: failure to either certify that all imported chemical substances are in compliance with TSCA or are not subject to TSCA, and falsification of a certification report.
	- Any violation of TSCA Section 8 including: failure to submit required records, falsification of records, and incomplete reporting and/or recordkeeping.
Pesticides/FIFRA	° Significant violator is any violator which meets the criteria for significant cases set forth in 40 CFR 173. In general, priority areas will consist of those State pesticide activities which present the greatest potential for harm to health or the environment. EPA will determine on a case-by-case basis which allegations in the priority areas agreed to by EPA and the State in the Cooperative Agreement involve "significant" violations to be formally referred to the State and traced.

PROGRAM DEFINITIONS FOR SIGNIFICANT NONCOMPLIERS AND SIGNIFICANT VIOLATORS

Media Program	Term/Definition
Air/CAA	° Significant violator meets any one of the following requirements: - A source in violation of a hazardous air pollutant standard, other than a source violating asbestos demolition and renovation requirements. - A source in violation of new source requirements, including NSPS, PSD, and Part D nonattainment permitting requirements. - A Class A source in violation of a SIP if the source is located so as to impact a nonattainment area and is in violation for the pollutant for which the area is nonattainable. - A source in violation of a Federal consent decree or Administrative Order. - A Class A Federal facility violator.

MEDIA PROGRAM DEFINTIONS FOR MAJOR vs MINOR FACILITIES OR EQUIVALENT TERMS

1. NPDES

A. Industrial (See Attachment for Classification scheme) The Environmental Protection Agency designates an industrial discharger a major NPDES permit by applying a numerical permit rating system to each industrial permit. This rating system assigns points to individual permittee based on an assessment of five characteristics of the permittee's discharge. The five characteristics or "rating criteria" are:

1) Toxic pollutant potential
2) Flow/streamflow volume
3) Traditional pollutants
4) Potential public health impacts
5) Water quality factors

For detailed defintions see attachment

B. Municipal

1. Major: Treatment process or facility that services 10,000 or more population, discharges in excess of 1 mgd, or discharges into an environmentally fragile, "pristine" body of water.

Minor: Treatment process or facility not covered in the above criteria.

2. Drinking Water

A. UIC:

Major and minors as identified in attached 40 CFR Part 144.3. Minors are those not identified as majors. Major "Facility or activity" is classified as such by the regional administrator or, in the case of approved state programs, the regional administrator in conjunction with the state director.

B. Public Water System

1. Community public water system is any public water system that has 15 or more service connections year round or serves 25 or more residents year round.

2. Noncoummuinty public water system is any system that does not meet the above criteria.

3. TSCA

A. Minors and majors not applicable terms for this program

4. AIR

A. Class A1 any major stationary source whose actual emissions, or potential controlled emissions operating at design capacity, are equal to or exceed 100 tons per year of any regulated criteria pollutant.

Class A2 any stationary source whose uncontrolled emissions operating at the design capacity are equal to or exceed 100 tons per year for any regulated criteria pollutant, but whose actual or potential or controlled emissions (which ever is greater) is less than 100 tons per year.

Class B any stationary source that has actual or the potential for uncontrolled emissions of less than 100 tons per year.

5. RCRA (See attachment 2 for definitions)

A. High Priority Violators

B. Low Priority Violators

See attached

Classification of Major and Minor NPDES Industrial Permits

The Office of Water Enforcement and Permits designates an industrial discharger a major NPDES permit by applying a numerical permit rating system to each industiral permit. This rating system assigns points to an individual permittee based on an assessment of five characteristics of the permittee's discharge. The five characteristics or "rating criteria" are:

1) Toxic Pollutant Potential
2) Flow/Streamflow Volume
3) Traditional Pollutants
4) Potential Public Health Impacts
5) Water Quality Factors

The rate an industrial permit, an NPDES Industrial Permit Rating Worksheet must be filled out. Attached is an example of a worksheet completed by a state permitting authority. A worksheet is filled out by evaluating the current permit application, the permit itself, and other monitoring forms kept in the individual permit file. The sum of these weighted point values is the permit's ranking. The point totals range from zero to a maximum of 265.

To generate the major industrial permit lists for each NPDES State and EPA Region, the data for each permittee is loaded into the NEIC computer system in Denver. The numbered boxes on the worksheet correlate to specific point values programmed into the computer. The computer addes the points for each criteria for each permit and arranges each permit by State in descending numerical order.

Currently, a permit assigned a point total of 80 points or higher is designated a major permit. All permits below 80 points are designated minor permits. This is an artificial cutoff point but one which maintains the total number of major permits originally designated major during the first round of permitting. It also includes most permits which the NPDES permitting authorities collectively believe should be considered major dischargers.

In addition, each Region, in consultation with their NPDES States, is allowed to designate a certain percentage of their total permits "discretionary addition" major permits. These are statuts but for one reason or another did not achieve sufficient points to be rated a major permit. A "discretionary addition" is assigned an arbitrary 500 points to give it major status and to flag it as a discretionary major permit. There are 400 discretionary addition major at this time.

RCRA PROGRAM DEFINITIONS

RCRA Violation Definitions

The RCRA Enforcement Response Policy classifies individual facility violations into one of two categories.

1. Class I Violation

Deviations from regulations, or provisions of compliance orders, consent agreements, consent decrees, or permit conditions which could result in a failure to:

a) Assure that hazardous waste is destined for and delivered to authorized treatment, storage, or disposal facilities (TSDFs); or

b) Prevent releases of hazardous waste or constituents, both during the active and any applicable post-closure periods of the facility operation where appropriate; or

c) Assure early detection of such release; or

d) Perform emergency clean-up operation or other corrective action for releases.

2. Class II Violation

Any violation of a RCRA requirement that does not meet the criteria listed above for Class I violations.

Class II violations are defined in the negative, i.e., they include all violations that are not considered Class I, and therefore are those violations which do not involve deviations from requirements which could result in failure to: 1) assure that wastes are destined for only authorized TSDFs, 2) prevent releases, 3) assure detection or 4) perform corrective action for such releases.

RCRA Violator Definitions and Enforcement Responses

A RCRA handler is classified as a violator based upon the nature of his or her violation (s) along with a number of other factors (e.g., compliance history, previous recalcitrant behavior, etc.). The Enforcement Response Policy establishes three categories of violators - High Priority, Medium Priority, and Low Priority - and define timely and appropriate enforcement response.

1. High Priority Violator

Definition: A High Priority Violator is a handler who:

- Has cause actual exposure or a substantial likelihood of exposure to hazardous waste or hazardous constitutents; or
- Is a chronic or recalcitrant violator (This may include some handlers who are regularly found to have many Class I or Class II violations.); or
- Deviates from terms of a permit, order or decree by not meeting the requirements in a timely manner and/or by failing to perform work as required by terms of permits, orders, or decrees; or
- Substantially deviates from RCRA statutory requirements.

High Priority Violators (HPV) represent the category of violators that merit the most stringent and immediate enforcement response. These violators should be the highest priorities for enforcement action in cnjunction with those program priorities set out annually in the RIP.

The response timeframes allow 45 days from the day an inspection is completed to identify or "discover" the violations.

Once violation discovery is made, it is expected that, for HPVs, within 90 days a formal administrative enforcement action will be taken, or a referral will be made for judicial or EPA action. If a judicial referral is made, it is expected that the case will be filed within 60 days of referral. These timeframes are discussed in greater detail on page 12.

The goal of any enforcement action against a High Priority violator is a to impose sanctions which will:

- Compel a rapid return to compliance;
- Penalize the violator and recover economic savings the violator may have accrued ; and

- Deter members of the regulated community from violating the law.

2. Medium Priority Violators

Definition: A Medium Priority Violator is a handler with one or more Class I violations who does not meet the criteria for a High Priority Violator. Handlers with only Class II may also be Medium Priority Violators when the compliance official believes an administrative order is the appropriate response to a facility with only Class II violations.

The appropriate response to the Medium Priority Violator is either the issuance of an administrative order or a less formal response which results in compliance within 90 days of violation discovery. The issuance of an administrative order with penalties is the preferred response to a Medium Priority Violator. If the decision is made to issue an order, the order should be issued within 120 days of violation discovery. A penalty is not required.

Where there is reason to believe a Notice of Violation (NOV) or Warning Letter (WL) will bring about a timely return-to-compliance, this less formal action may be used in response to Medium Priority Violators. If the initial NOV or WL does not result in final compliance or a compliance schedule incorporated in an enforceable order within 90 days of violation discovery, a decision must be made to escalate. Escalation entails either development of a judicial referral or development and issuance of an administrative order. For generators with no violations of land disposal restriction requirements, up to 120 days may be allowed to return the facility to compliance before escalation is required.

If an administrative order is chosen as the escalated response, the State/Region has 60 days to develop and issue the order. If a judical referral is selected, the State official. The case should then be filed within 60 days of referral.

While it is acceptable for a State/Region to initially address a Medium Priority Violator with an NOV or Warning Letter, no more than one WL or NOV should be issued. If compliance does not result, escalation should immediately follow.

3. Low Priority Violators

Definition: A handler who has only Class II violations who is not a Medium or High Priority Violator.

151

While EPA and most authorized States have the authority to respond to any Subtitle C violation with an order or referral, a Low Priority Violator will normally receive an NOV or Warning Letter as the initial response within 60 days of violation discovery. If this response does not result in expeditious compliance, normally within 30-60 days of issuance, the Regional Office or authorized State should consider whether the violation warrants issuing an order. In cases involving large numbers of Class II violations, repeated Class II violations, or any other case the enforcement authority considers serious, the handler should be carefully evaluated to determine whether the handler meets any of the High Priority Violator criteria, or may be better addressed as a Medium Priority Violator therefore requiring an enforcement action as described under the appropriate section.

Characteristic of High Priority Violators

The following criteria are set out to assist the agencies in determining the category of violators that must consistently receive the highest priority for enforcement.

a) A handler who has caused actual exposure, or substantial likelihood of exposure to hazardous waste or hazardous constituents.

Handlers that have caused actual exposure or a threat of exposure are always considered High Priority Violators.

Evaluating when a handler "...caused a substantial likelihood of exposure to hazardous waste..." should be done on the basis of the case-specific information. All violations at a site should be considered in making this determination. Addititional factors such as the quantity of waste involved, toxicity, environmental persistence, or other hazard posed by the waste, waste management practices, proximity of human and environmental receptors (including employees), exposure pathways, etc. should be considered.

APPENDIX D

EPA ENVIRONMENTAL AUDITING POLICY STATEMENT
(JULY 9, 1986)

ENVIRONMENTAL PROTECTION AGENCY

[OPPE-FRL-3046-6]

Environmental Auditing Policy Statement

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final policy statement.

SUMMARY: It is EPA policy to encourage the use of environmental auditing by regulated entities to help achieve and maintain compliance with environmental laws and regulations, as well as to help identify and correct unregulated environmental hazards. EPA first published this policy as interim guidance on November 8, 1985 (50 FR 46504). Based on comments received regarding the interim guidance, the Agency is issuing today's final policy statement with only minor changes.

This final policy statement specifically:

- Encourages regulated entities to develop, implement and upgrade environmental auditing programs;
- Discusses when the Agency may or may not request audit reports;
- Explains how EPA's inspection and enforcement activities may respond to regulated entities' efforts to assure compliance through auditing;
- Endorses environmental auditing at federal facilities;
- Encourages state and local environmental auditing initiatives; and
- Outlines elements of effective audit programs.

Environmental auditing includes a variety of compliance assessment techniques which go beyond those legally required and are used to identify actual and potential environmental problems. Effective environmental auditing can lead to higher levels of overall compliance and reduced risk to human health and the environment. EPA endorses the practice of environmental auditing and supports its accelerated use by regulated entities to help meet the goals of federal, state and local environmental requirements. However, the existence of an auditing program does not create any defense to, or otherwise limit, the responsibility of any regulated entity to comply with applicable regulatory requirements.

States are encouraged to adopt these or similar and equally effective policies in order to advance the use of environmental auditing on a consistent, nationwide basis.

DATES: This final policy statement is effective July 9, 1986.

FOR FURTHER INFORMATION CONTACT:

Leonard Fleckenstein, Office of Policy, Planning and Evaluation, (202) 382-2726;

or

Cheryl Wasserman, Office of Enforcement and Compliance Monitoring, (202) 382-7550.

SUPPLEMENTARY INFORMATION:

ENVIRONMENTAL AUDITING POLICY STATEMENT

I. Preamble

On November 8, 1985 EPA published an Environmental Auditing Policy Statement, effective as interim guidance, and solicited written comments until January 7, 1986.

Thirteen commenters submitted written comments. Eight were from private industry. Two commenters represented industry trade associations. One federal agency, one consulting firm and one law firm also submitted comments.

Twelve commenters addressed EPA requests for audit reports. Three comments per subject were received regarding inspections, enforcement response and elements of effective environmental auditing. One commenter addressed audit provisions as remedies in enforcement actions, one addressed environmental auditing at federal facilities, and one addressed the relationship of the policy statement to state or local regulatory agencies. Comments generally supported both the concept of a policy statement and the interim guidance, but raised specific concerns with respect to particular language and policy issues in sections of the guidance.

General Comments

Three commenters found the interim guidance to be constructive, balanced and effective at encouraging more and better environmental auditing.

Another commenter, while considering the policy on the whole to be constructive, felt that new and identifiable auditing "incentives" should be offered by EPA. Based on earlier comments received from industry, EPA believes most companies would not support or participate in an "incentives-based" environmental auditing program with EPA. Moreover, general promises to forgo inspections or reduce enforcement responses in exchange for companies' adoption of environmental auditing programs—the "incentives" most frequently mentioned in this context—are fraught with legal and policy obstacles.

Several commenters expressed concern that states or localities might use the interim guidance to *require* auditing. The Agency disagrees that the policy statement opens the way for states and localities to require auditing. No EPA policy can grant states or localities any more (or less) authority than they already possess. EPA believes that the interim guidance effectively encourages *voluntary* auditing. In fact, Section II.B. of the policy states: "because audit quality depends to a large degree on genuine management commitment to the program and its objectives, auditing should remain a voluntary program."

Another commenter suggested that EPA should not expect an audit to identify all potential problem areas or conclude that a problem identified in an audit reflects normal operations and procedures. EPA agrees that an audit report should clearly reflect these realities and should be written to point out the audit's limitations. However, since EPA will not routinely request audit reports, the Agency does not believe these concerns raise issues which need to be addressed in the policy statement.

A second concern expressed by the same commenter was that EPA should acknowledge that environmental audits are only part of a successful environmental management program and thus should not be expected to cover every environmental issue or solve all problems. EPA agrees and accordingly has amended the statement of purpose which appears at the end of this preamble.

Yet another commenter thought EPA should focus on environmental performance results (compliance or non-compliance), not on the processes or vehicles used to achieve those results. In general, EPA agrees with this statement and will continue to focus on environmental results. However, EPA also believes that such results can be improved through Agency efforts to identify and encourage effective environmental management practices, and will continue to encourage such practices in non-regulatory ways.

A final general comment recommended that EPA should sponsor seminars for small businesses on how to start auditing programs. EPA agrees that such seminars would be useful. However, since audit seminars already are available from several private sector organizations, EPA does not believe it should intervene in that market, with the possible exception of seminars for government agencies, especially federal agencies, for which EPA has a broad mandate under Executive Order 12088 to provide technical assistance for environmental compliance.

Requests for Reports

EPA received 12 comments regarding Agency requests for environmental audit reports, far more than on any other topic in the policy statement. One commenter felt that EPA struck an appropriate balance between respecting the need for self-evaluation with some measure of privacy, and allowing the Agency enough flexibility of inquiry to accomplish future statutory missions. However, most commenters expressed concern that the interim guidance did not go far enough to assuage corporate fears that EPA will use audit reports for environmental compliance "witch hunts." Several commenters suggested additional specific assurances regarding the circumstances under which EPA will request such reports.

One commenter recommended that EPA request audit reports only "when the Agency can show the information it needs to perform its statutory mission cannot be obtained from the monitoring, compliance or other data that is otherwise reportable and/or accessible to EPA, or where the Government deems an audit report material to a criminal investigation." EPA accepts this recommendation in part. The Agency believes it would not be in the best interest of human health and the environment to commit to making a "showing" of a compelling information need before ever requesting an audit report. While EPA may normally be willing to do so, the Agency cannot rule out in advance all circumstances in which such a showing may not be possible. However, it would be helpful to further clarify that a request for an audit report or a portion of a report normally will be made when needed information is not available by alternative means. Therefore, EPA has revised Section III.A., paragraph two and added the phrase: "and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency."

Another commenter suggested that (except in the case of criminal investigations) EPA should limit requests for audit documents to specific questions. By including the phrase "or relevant portions of a report" in Section III.A., EPA meant to emphasize it would not request an entire audit document when only a relevant portion would suffice. Likewise, EPA fully intends not to request even a portion of a report if needed information or data can be otherwise obtained. To further clarify this point EPA has added the phrase, "most likely focused on particular information needs rather than the entire report," to the second sentence of paragraph two, Section III.A. Incorporating the two comments above, the first two sentences in paragraph two of final Section III.A. now read: "EPA's authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission or the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency."

Other commenters recommended that EPA not request audit reports under any circumstances, that requests be "restricted to only those legally required," that requests be limited to criminal investigations, or that requests be made only when EPA has reason to believe "that the audit programs or reports are being used to conceal evidence of environmental non-compliance or otherwise being used in bad faith." EPA appreciates concerns underlying all of these comments and has considered each carefully. However, the Agency believes that these recommendations do not strike the appropriate balance between retaining the flexibility to accomplish EPA's statutory missions in future, unforeseen circumstances, and acknowledging regulated entities' need to self-evaluate environmental performance with some measure of privacy. Indeed, based on prime informal comments, the small number of formal comments received, and the even smaller number of adverse comments, EPA believes the final policy statement should remain largely unchanged from the interim version.

Elements of Effective Environmental Auditing

Three commenters expressed concerns regarding the seven general elements EPA outlined in the Appendix to the interim guidance.

One commenter noted that were EPA to further expand or more fully detail such elements, programs not specifically fulfilling each element would then be judged inadequate. EPA agrees that presenting highly specific and prescriptive auditing elements could be counter-productive by not taking into account numerous factors which vary extensively from one organization to another, but which may still result in effective auditing programs. Accordingly, EPA does not plan to expand or more fully detail these auditing elements.

Another commenter asserted that states and localities should be cautioned not to consider EPA's auditing elements as mandatory steps. The Agency is fully aware of this concern and in the interim guidance noted its strong opinion that "regulatory agencies should not attempt to prescribe the precise form and structure of regulated entities' environmental management or auditing programs." While EPA cannot require state or local regulators to adopt this or similar policies, the Agency does strongly encourage them to do so, both in the interim and final policies.

A final commenter thought the Appendix too specifically prescribed what should and what should not be included in an auditing program. Other commenters, on the other hand, viewed the elements described as very general in nature. EPA agrees with these other commenters. The elements are in no way binding. Moreover, EPA believes that most mature, effective environmental auditing programs do incorporate each of these general elements in some form, and considers them useful yardsticks for those considering adopting or upgrading audit programs. For these reasons EPA has not revised the Appendix in today's final policy statement.

Other Comments

Other significant comments addressed EPA inspection priorities for, and enforcement responses to, organizations with environmental auditing programs.

One commenter, stressing that audit programs are *internal* management tools, took exception to the phrase in the second paragraph of section III.B.1. of the interim guidance which states that environmental audits can 'complement' regulatory oversight. By using the word 'complement' in this context, EPA does not intend to imply that audit reports must be obtained by the Agency in order to supplement regulatory inspections. 'Complement' is used in a broad sense of being in addition to inspections and providing something (i.e., self-assessment) which otherwise would be lacking. To clarify this point EPA has added the phrase "by providing self-assessment to assure compliance" after "environmental audits may complement inspections" in this paragraph.

The same commenter also expressed concern that, as EPA sets inspection priorities, a company having an audit program could appear to be a 'poor performer' due to complete and accurate reporting when measured against a company which reports something less than required by law. EPA agrees that it is important to communicate this fact to Agency and state personnel, and will do so. However, the Agency does not believe a change in the policy statement is necessary.

A further comment suggested EPA should commit to take auditing programs into account when assessing all enforcement actions. However, in order to maintain enforcement flexibility under varied circumstances, the Agency cannot promise reduced enforcement responses to violations at all audited facilities when other factors may be overriding. Therefore the policy statement continues to state that EPA may exercise its decretion to consider auditing programs as evidence of honest and genuine efforts to assure compliance, which would then be taken into account in fashioning enforcement responses to violations.

A final commenter suggested the phrase "expeditiously correct environmental problems" not be used in the enforcement context since it implied EPA would use an entity's record of correcting nonregulated matters when evaluating regulatory violations. EPA did not intend for such an inference to be made. EPA intended the term "environmental problems" to refer to the underlying circumstances which eventually lead up to the violations. To clarify this point, EPA is revising the first two sentences of the paragraph to which this comment refers by changing "environmental problems" to "violations and underlying environmental problems" in the first sentence and to "underlying environmental problems" in the second sentence.

In a separate development EPA is preparing an update of its January 1984 *Federal Facilities Compliance Strategy*, which is referenced in section III. C. of the auditing policy. The Strategy should be completed and available on request from EPA's Office of Federal Activities later this year.

EPA thanks all commenters for responding to the November 8, 1985 publication. Today's notice is being issued to inform regulated entities and the public of EPA's final policy toward environmental auditing. This policy was developed to help (a) encourage regulated entities to institutionalize effective audit practices as one means of improving compliance and sound environmental management, and (b) guide internal EPA actions directly related to regulated entities' environmental auditing programs.

EPA will evaluate implementation of this final policy to ensure it meets the above goals and continues to encourage better environmental management, while strengthening the Agency's own efforts to monitor and enforce compliance with environmental requirements.

II. General EPA Policy on Environmental Auditing

A. Introduction

Environmental auditing is a systematic, documented, periodic and objective review by regulated entities [1] of facility operations and practices related to meeting environmental requirements. Audits can be designed to accomplish any or all of the following: verify compliance with environmental requirements; evaluate the effectiveness of environmental management systems already in place; or assess risks from regulated and unregulated materials and practices.

Auditing serves as a quality assurance check to help improve the effectiveness of basic environmental management by verifying that management practices are in place, functioning and adequate. Environmental audits evaluate, and are not a substitute for, direct compliance activities such as obtaining permits, installing controls, monitoring compliance, reporting violations, and keeping records. Environmental auditing may verify but does not include activities required by law, regulation or permit (e.g., continuous emissions monitoring, composite correction plans at wastewater treatment plants, etc.). Audits do not in any way replace regulatory agency inspections. However, environmental audits can improve compliance by complementing conventional federal, state and local oversight.

The appendix to this policy statement outlines some basic elements of environmental auditing (e.g., auditor independence and top management support) for use by those considering implementation of effective auditing programs to help achieve and maintain compliance. Additional information on environmental auditing practices can be found in various published materials.[2]

Environmental auditing has developed for sound business reasons, particularly as a means of helping regulated entities manage pollution control affirmatively over time instead of reacting to crises. Auditing can result in improved facility environmental performance, help communicate effective solutions to common environmental problems, focus facility managers' attention on current and upcoming regulatory requirements, and generate protocols and checklists which help facilities better manage themselves. Auditing also can result in better-integrated management of environmental hazards, since auditors frequently identify environmental liabilities which go beyond regulatory compliance. Companies, public entities and federal facilities have employed a variety of environmental auditing practices in recent years. Several hundred major firms in diverse industries now have environmental auditing programs, although they often are known by other names such as assessment, survey, surveillance, review or appraisal.

While auditing has demonstrated its usefulness to those with audit programs, many others still do not audit. Clarification of EPA's position regarding auditing may help encourage regulated entities to establish audit programs or upgrade systems already in place.

B. EPA Encourages the Use of Environmental Auditing

EPA encourages regulated entities to adopt sound environmental management practices to improve environmental performance. In particular, EPA encourages regulated entities subject to environmental regulations to institute environmental auditing programs to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Implementation of environmental auditing programs can result in better identification, resolution and avoidance of environmental problems, as well as improvements to management practices. Audits can be conducted effectively by independent internal or third party auditors. Larger organizations generally have greater resources to devote to an internal audit team, while smaller entities might be more likely to use outside auditors.

Regulated entities are responsible for taking all necessary steps to ensure compliance with environmental requirements, whether or not they adopt audit programs. Although environmental laws do not require a regulated facility to have an auditing program, ultimate responsibility for the environmental performance of the facility lies with top management, which therefore has a strong incentive to use reasonable means, such as environmental auditing, to secure reliable information of facility compliance status.

---

[1] "Regulated entities" include private firms and public agencies with facilities subject to environmental regulation. Public agencies can include federal, state or local agencies as well as special-purpose organizations such as regional sewage commissions.

[2] See, e.g., "Current Practices in Environmental Auditing," EPA Report No. EPA-230-09-83-006, February 1984; "Annotated Bibliography on Environmental Auditing," Fifth Edition, September 1985, both available from: Regulatory Reform Staff, PM-223, EPA, 401 M Street SW, Washington, DC 20460.

EPA does not intend to dictate or interfere with the environmental management practices of private or public organizations. Nor does EPA intend to mandate auditing (though in certain instances EPA may seek to include provisions for environmental auditing as part of settlement agreements, as noted below). Because environmental auditing systems have been widely adopted on a voluntary basis in the past, and because audit quality depends to a large degree upon genuine management commitment to the program and its objectives, auditing should remain a voluntary activity.

III. EPA Policy on Specific Environmental Auditing Issues

A. Agency Requests for Audit Reports

EPA has broad statutory authority to request relevant information on the environmental compliance status of regulated entities. However, EPA believes routine Agency requests for audit reports [3] could inhibit auditing in the long run, decreasing both the quantity and quality of audits conducted. Therefore, as a matter of policy, EPA will *not* routinely request environmental audit reports.

EPA's authority to request an audit report, or relevant portions thereof, will be exercised on a case-by-case basis where the Agency determines it is needed to accomplish a statutory mission, or where the Government deems it to be material to a criminal investigation. EPA expects such requests to be limited, most likely focused on particular information needs rather than the entire report, and usually made where the information needed cannot be obtained from monitoring, reporting or other data otherwise available to the Agency. Examples would likely include situations where: audits are conducted under consent decrees or other settlement agreements; a company has placed its management practices at issue by raising them as a defense; or state of mind or intent are a relevant element of inquiry, such as during a criminal investigation. This list is illustrative rather than exhaustive, since there doubtless will be other situations, not subject to prediction, in which audit reports rather than information may be required.

EPA acknowledges regulated entities' need to self-evaluate environmental performance with some measure of privacy and encourages such activity. However, audit reports may not shield monitoring, compliance, or other information that would otherwise be reportable and/or accessible to EPA, even if there is no explicit 'requirement' to generate that data.[4] Thus, this policy does not alter regulated entities' existing or future obligations to monitor, record or report information required under environmental statutes, regulations or permits, or to allow EPA access to that information. Nor does this policy alter EPA's authority to request and receive any relevant information—including that contained in audit reports—under various environmental statutes (e.g., Clean Water Act section 308, Clean Air Act sections 114 and 208) or in other administrative or judicial proceedings.

Regulated entities also should be aware that certain audit findings may by law have to be reported to government agencies. However, in addition to any such requirements, EPA encourages regulated entities to notify appropriate State or Federal officials of findings which suggest significant environmental or public health risks, even when not specifically required to do so.

B. EPA Response to Environmental Auditing

1. General Policy

EPA will not promise to forgo inspections, reduce enforcement responses, or offer other such incentives in exchange for implementation of environmental auditing or other sound environmental management practices. Indeed, a credible enforcement program provides a strong incentive for regulated entities to audit.

Regulatory agencies have an obligation to assess source compliance status independently and cannot eliminate inspections for particular firms or classes of firms. Although environmental audits may complement inspections by providing self-assessment to assure compliance, they are in no way a substitute for regulatory oversight. Moreover, certain statutes (e.g. RCRA) and Agency policies establish minimum facility inspection frequencies to which EPA will adhere.

However, EPA will continue to address environmental problems on a priority basis and will consequently inspect facilities with poor environmental records and practices more frequently. Since effective environmental auditing helps management identify and promptly correct actual or potential problems, audited facilities' environmental performance should improve. Thus, while EPA inspections of self-audited facilities will continue, to the extent that compliance performance is considered in setting inspection priorities, facilities with a good compliance history may be subject to fewer inspections.

In fashioning enforcement responses to violations, EPA policy is to take into account, on a case-by-case basis, the honest and genuine efforts of regulated entities to avoid and promptly correct violations and underlying environmental problems. When regulated entities take reasonable precautions to avoid noncompliance, expeditiously correct underlying environmental problems discovered through audits or other means, and implement measures to prevent their recurrence, EPA may exercise its discretion to consider such actions as honest and genuine efforts to assure compliance. Such consideration applies particularly when a regulated entity promptly reports violations or compliance data which otherwise were not required to be recorded or reported to EPA.

2. Audit Provisions as Remedies in Enforcement Actions

EPA may propose environmental auditing provisions in consent decrees and in other settlement negotiations where auditing could provide a remedy for identified problems and reduce the likelihood of similar problems recurring in the future.[5] Environmental auditing provisions are most likely to be proposed in settlement negotiations where:

- A pattern of violations can be attributed, at least in part, to the absence or poor functioning of an environmental management system; or
- The type or nature of violations indicates a likelihood that similar noncompliance problems may exist or occur elsewhere in the facility or at other facilities operated by the regulated entity.

---

[3] An "environmental audit report" is a written report which candidly and thoroughly presents findings from a review, conducted as part of an environmental audit as described in section II.A., of facility environmental performance and practices. An audit report is not a substitute for compliance monitoring reports or other reports or records which may be required by EPA or other regulatory agencies.

[4] See, for example, "Duties to Report or Disclose Information on the Environmental Aspects of Business Activities," Environmental Law Institute report to EPA, final report, September 1985.

[5] EPA is developing guidance for use by Agency negotiators in structuring appropriate environmental audit provisions for consent decrees and other settlement negotiations.

Through this consent decree approach and other means, EPA may consider how to encourage effective auditing by publicly owned sewage treatment works (POTWs). POTWs often have compliance problems related to operation and maintenance procedures which can be addressed effectively through the use of environmental auditing. Under its National Municipal Policy EPA already is requiring many POTWs to develop composite correction plans to identify and correct compliance problems.

C. Environmental Auditing at Federal Facilities

EPA encourages all federal agencies subject to environmental laws and regulations to institute environmental auditing systems to help ensure the adequacy of internal systems to achieve, maintain and monitor compliance. Environmental auditing at federal facilities can be an effective supplement to EPA and state inspections. Such federal facility environmental audit programs should be structured to promptly identify environmental problems and expenditiously develop schedules for remedial action.

To the extent feasible, EPA will provide technical assistance to help federal agencies design and initiate audit programs. Where appropriate, EPA will enter into agreements with other agencies to clarify the respective roles, responsibilities and commitments of each agency in conducting and responding to federal facility environmental audits.

With respect to inspections of self-audited facilities (see section III.B.1 above) and requests for audit reports (see section III.A above), EPA generally will respond to environmental audits by federal facilities in the same manner as it does for other regulated entities, in keeping with the spirit and intent of Executive Order 12088 and the EPA *Federal Facilities Compliance Strategy* (January 1984, update forthcoming in late 1986). Federal agencies should, however, be aware that the Freedom of Information Act will govern any disclosure of audit reports or audit-generated information requested from federal agencies by the public.

When federal agencies discover significant violations through an environmental audit, EPA encourages them to submit the related audit findings and remedial action plans expeditiously to the applicable EPA regional office (and responsible state agencies, where appropriate) even when not specifically required to do so. EPA will review the audit findings and action plans and either provide written approval or negotiate a Federal Facilities Compliance Agreement. EPA will utilize the escalation procedures provided in Executive Order 12088 and the EPA *Federal Facilities Compliance Strategy* only when agreement between agencies cannot be reached. In any event, federal agencies are expected to report pollution abatement projects involving costs (necessary to correct problems discovered through the audit) to EPA in accordance with OMB Circular A-106. Upon request, and in appropriate circumstances, EPA will assist affected federal agencies through coordination of any public release of audit findings with approved action plans once agreement has been reached.

IV. Relationship to State or Local Regulatory Agencies

State and local regulatory agencies have independent jurisdiction over regulated entities. EPA encourages them to adopt these or similar policies, in order to advance the use of effective environmental auditing in a consistent manner.

EPA recognizes that some states have already undertaken environmental auditing initiatives which differ somewhat from this policy. Other states also may want to develop auditing policies which accommodate their particular needs or circumstances. Nothing in this policy statement is intended to preempt or preclude states from developing other approaches to environmental auditing. EPA encourages state and local authorities to consider the basic principles which guided the Agency in developing this policy:

- Regulated entities must continue to report or record compliance information required under existing statutes or regulations, regardless of whether such information is generated by an environmental audit or contained in an audit report. Required information cannot be withheld merely because it is generated by an audit rather than by some other means.
- Regulatory agencies cannot make promises to forgo or limit enforcement action against a particular facility or class of facilities in exchange for the use of environmental auditing systems. However, such agencies may use their discretion to adjust enforcement actions on a case-by-case basis in response to honest and genuine efforts by regulated entities to assure environmental compliance.
- When setting inspection priorities regulatory agencies should focus to the extent possible on compliance performance and environmental results.
- Regulatory agencies must continue to meet minimum program requirements (e.g., minimum inspection requirements, etc.).
- Regulatory agencies should not attempt to prescribe the precise form and structure of regulated entities' environmental management or auditing programs.

An effective state/federal partnership is needed to accomplish the mutual goal of achieving and maintaining high levels of compliance with environmental laws and regulations. The greater the consistency between state or local policies and this federal response to environmental auditing, the greater the degree to which sound auditing practices might be adopted and compliance levels improve.

Dated: June 28, 1986.

Lee M. Thomas,

Administrator.

Appendix—Elements of Effective Environmental Auditing Programs

Introduction: Environmental auditing is a systematic, documented, periodic and objective review by a regulated entity of facility operations and practices related to meeting environmental requirements.

Private sector environmental audits of facilities have been conducted for several years and have taken a variety of forms, in part to accommodate unique organizational structures and circumstances. Nevertheless, effective environmental audits appear to have certain discernible elements in common with other kinds of audits. Standards for internal audits have been documented extensively. The elements outlined below draw heavily on two of these documents: "Compendium of Audit Standards" (©1983, Walter Willborn, American Society for Quality Control) and "Standards for the Professional Practice of Internal Auditing" (©1981, The Institute of Internal Auditors, Inc.). They also reflect Agency analyses conducted over the last several years.

Performance-oriented auditing elements are outlined here to help accomplish several objectives. A general description of features of effective, mature audit programs can help those starting audit programs, especially federal agencies and smaller businesses. These elements also indicate the attributes of auditing EPA generally considers important to ensure program effectiveness. Regulatory agencies may use these elements in negotiating environmental auditing provisions for consent decrees. Finally, these elements can help guide states and localities considering auditing initiatives.

An effective environmental auditing system will likely include the following general elements:

I. *Explicit top management support for environmental auditing and commitment to follow-up on audit findings.* Management support may be demonstrated by a written policy articulating upper management support for the auditing program, and for compliance with all pertinent requirements, including corporate policies and permit requirements as well as federal, state and local statutes and regulations.

Management support for the auditing program also should be demonstrated by an explicit written commitment to follow-up on audit findings to correct identified problems and prevent their recurrence.

II. *An environmental auditing function independent of audited activities.* The status or organizational locus of environmental auditors should be sufficient to ensure objective and unobstructed inquiry, observation and testing. Auditor objectivity should not be impaired by personal relationships, financial or other conflicts of interest, interference with free inquiry or judgment, or fear of potential retribution.

III. *Adequate team staffing and auditor training.* Environmental auditors should possess or have ready access to the knowledge, skills, and disciplines needed to accomplish audit objectives. Each individual auditor should comply with the company's professional standards of conduct. Auditors, whether full-time or part-time, should maintain their technical and analytical competence through continuing education and training.

IV. *Explicit audit program objectives, scope, resources and frequency.* At a minimum, audit objectives should include assessing compliance with applicable environmental laws and evaluating the adequacy of internal compliance policies, procedures and personnel training programs to ensure continued compliance.

Audits should be based on a process which provides auditors: all corporate policies, permits, and federal, state, and local regulations pertinent to the facility; and checklists or protocols addressing specific features that should be evaluated by auditors.

Explicit written audit procedures generally should be used for planning audits, establishing audit scope, examining and evaluating audit findings, communicating audit results, and following-up.

V. *A process which collects, analyzes, interprets and documents information sufficient to achieve audit objectives.* Information should be collected before and during an onsite visit regarding environmental compliance(*1*), environmental management effectiveness(*2*), and other matters (*3*) related to audit objectives and scope. This information should be sufficient, reliable, relevant and useful to provide a sound basis for audit findings and recommendations.

a. *Sufficient* information is factual, adequate and convincing so that a prudent, informed person would be likely to reach the same conclusions as the auditor.

b. *Reliable* information is the best attainable through use of appropriate audit techniques.

c. *Relevant* information supports audit findings and recommendations and is consistent with the objectives for the audit.

d. *Useful* information helps the organization meet its goals.

The audit process should include a periodic review of the reliability and integrity of this information and the means used to identify, measure, classify and report it. Audit procedures, including the testing and sampling techniques employed, should be selected in advance, to the extent practical, and expanded or altered if circumstances warrant. The process of collecting, analyzing, interpreting, and documenting information should provide reasonable assurance that audit objectivity is maintained and audit goals are met.

VI. *A process which includes specific procedures to promptly prepare candid, clear and appropriate written reports on audit findings, corrective actions, and schedules for implementation.* Procedures should be in place to ensure that such information is communicated to managers, including facility and corporate management, who can evaluate the information and ensure correction of identified problems. Procedures also should be in place for determining what internal findings are reportable to state or federal agencies.

VII. *A process which includes quality assurance procedures to assure the accuracy and thoroughness of environmental audits.* Quality assurance may be accomplished through supervision, independent internal reviews, external reviews, or a combination of these approaches.

Footnotes to Appendix

(*1*) A comprehensive assessment of compliance with federal environmental regulations requires an analysis of facility performance against numerous environmental statutes and implementing regulations. These statutes include:

Resource Conservation and Recovery Act
Federal Water Pollution Control Act
Clean Air Act
Hazardous Materials Transportation Act
Toxic Substances Control Act
Comprehensive Environmental Response, Compensation and Liability Act
Safe Drinking Water Act
Federal Insecticide, Fungicide and Rodenticide Act
Marine Protection, Research and Sanctuaries Act
Uranium Mill Tailings Radiation Control Act

In addition, state and local government are likely to have their own environmental laws. Many states have been delegated authority to administer federal programs. Many local governments' building, fire, safety and health codes also have environmental requirements relevant to an audit evaluation.

(*2*) An environmental audit could go well beyond the type of compliance assessment normally conducted during regulatory inspections, for example, by evaluating policies and practices, regardless of whether they are part of the environmental system or the operating and maintenance procedures. Specifically, audits can evaluate the extent to which systems or procedures:

1. Develop organizational environmental policies which: a. implement regulatory requirements; b. provide management guidance for environmental hazards not specifically addressed in regulations;

2. Train and motivate facility personnel to work in an environmentally-acceptable manner and to understand and comply with government regulations and the entity's environmental policy;

3. Communicate relevant environmental developments expeditiously to facility and other personnel;

4. Communicate effectively with government and the public regarding serious environmental incidents;

5. Require third parties working for, with or on behalf of the organization to follow its environmental procedures;

6. Make proficient personnel available at all times to carry out environmental (especially emergency) procedures:

7. Incorporate environmental protection into written operating procedures:

8. Apply best management practices and operating procedures. including "good housekeeping" techniques:

9. Institute preventive and corrective maintenance systems to minimize actual and potential environmental harm:

10. Utilize best available process and control technologies:

11. Use most-effective sampling and monitoring techniques. test methods, recordkeeping systems or reporting protocols (beyond minimum legal requirements):

12. Evaluate causes behind any serious environmental incidents and establish procedures to avoid recurrence:

13. Exploit source reduction. recycle and reuse potential wherever practical: and

14. Substitute materials or processes to allow use of the least-hazardous substances feasible.

(3) Auditors could also assess environmental risks and uncertainties.

[FR Doc. 86-15423 Filed 7-8-86 8:45 am]

BILLING CODE 6560-50-M

APPENDIX E

EPA "HOTLINE" ASSISTANCE

APPENDIX E

EPA "HOTLINE" ASSISTANCE

Toll-Free Numbers Offered by EPA Headquarters

- RCRA/Superfund Hotline -
  National Toll-Free 800-424-9346
  Washington, D.C., Metro 202-382-3000

EPA's largest and busiest toll-free number, the RCRA/Superfund Hotline answers nearly 100,000 questions and document requests each year. Hotline specialists answer regulatory and technical questions and provide documents on virtually all aspects of the RCRA and Superfund programs. Because of the complexity and changing nature of these programs, the hotline is used widely by the regulated community, people involved in managing and cleaning up hazardous waste, federal, state, and local governments, and the general public. The RCRA/Superfund Hotline can be reached Monday through Friday from 8:30 a.m.-4:30 p.m. Eastern Standard Time (EST).

- National Response Center Hotline -
  National Toll-Free 800-424-8802
  Washington, D.C. Metro 202-426-2675

Operated by the U.S. Coast Guard, the National Response Center Hotline responds to all kinds of accidental releases of oil and hazardous substances. Callers should contact this hotline to report chemical spills. The National Response Center Hotline is available 24 hours a day, seven days a week, every day of the year.

- The Emergency Planning and Community Right-to-Know (Title III) Hotline -

  National Toll-Free 800-535-0202
  Washington, D.C., Metro and Alaska 202-479-2449

The Title III Hotline has been in operation since late 1985, responding to questions concerning community preparedness for chemical accidents. The Superfund Amendments and Reauthoriaztion Act (SARA) has increased the CEPP Hotline's responsibilities, which now also include Emergency Planning and Community Right-to-Know, SARA Title III, questions and requests. The CEPP Hotline, which complements the RCRA/Superfund Hotline is maintained as an information resource rather than an emergency number. Calls are answered Monday through Friday from 8:30 a.m.-4:30 p.m. EST.

- National Pesticides Telecommunications Network (NPTN) -
  National Toll-Free 800-858-7378
  (858-P-E-S-T) Texas 806-743-3091

Operating 24 hours a day, seven days a week, every day of the year, the NPTN provides information about pesticides to the medical, veterinary, and professional communities as well as to Fedal agencies and the general public. Originally a service for physicians wanting information on pesticide toxicology and on recognition and management of pesticide poisonings, the NPTN has expanded to serve the public and Federal agencies by providing impartial information on pesticide products, basic safety practices, health and environmental effects, and cleanup and disposal procedures. Staffed by pesticide specialists at Texas Tech University's Health Sciences Center School of Medicine, this hotline handles about 18,000 calls each year.

- Small Business Hotline -
  National Toll-Free 800-368-5888
  Washington, D.C., Metro 703-557-1938

Sponsored by the EPA Small Business Ombudsman's Program, this hotline assists small businesses in complying with environmental laws and EPA regulations. The Small Business Hotline gives companies easy access to the Agency, and investigates and resolves problems and disputes with EPA. Acting as a liasion with Agency program offices, the hotline ensures that EPA considers small business issues during its normal regulatory activities. Federal agencies with only limited environmental activities or just a few, minor facilities may want to consider utilizing this service. The Small Business Hotline operates Monday through Friday from 8:30 a.m.-5:00 p.m. EST, handling over 7,000 inquiries each year.

- Safe Drinking Water Hotline -
  National Toll-Free 800-426-4791
  Washington, D.C., Metro 202-382-5533

The Environmental Protection Agency's Safe Drinking Water Hotline started operating in July, 1987. Its primary function is to assist the public and the regulated community, including Federal facilities, in understanding EPA's regulations and programs developed in response to the Safe Drinking Water Act Amendments of 1986. The Hotline service provides information on EPA's drinking water programs, including the Public Water Supply (PWS) and Underground Injection Control (UIC) Programs. The Hotline operates Monday through Friday (except Federal Holidays) from 8:30 a.m.-4:30 p.m., East Coast Time.

- Inspector General's Whistle Blower Hotline -
  National Toll-Free 800-424-4000
  Washington, D.C., Metro 202-382-4977

The EPA Inspector General's Office maintains the Whistle-Blower Hotline to receive reports of Agency-related waste, fraud, abuse, or mismanagement from the public and from EPA and other government employees. EPA employees may make complaints or give information to the Inspector General's office confidentially and without fear of reprisal. The Whistle-Blower Hotline is staffed to answer calls in person from 10:00 a.m. - 3:00 p.m. EST, Monday through Friday at other times, callers may leave a message to be answered during the next work day. This hotline handles about 1,500 calls each year.

Commercial Numbers Offered by EPA Headquarters

- TSCA Assistance Office -
  202-554-1404

The TSCA Assistance Office provides information on TSCA regulations to the chemical industry, labor and trade organizations, environmental groups, Federal facilities, and the general public. Technical as well as general information is available. To help facilities comply with TSCA, a variety of services are offered, including TSCA regulation and support documents, a bi-monthly newsletter, publications, and audiovisual material. In addition, the TSCA Assistance Office will arrange meeting between EPA and industry to discuss and clarify TSCA regulations and arrange for Agency speakers, upon request. The TSCA Assistance Office now handles about 2,500 calls a month, and can be reached from 8:30 a.m. - 5:00 p.m. EST, Monday through Friday.

- Control Technology Center Hotline -
  919-541-0800

A component of EPA's Air Toxics Strategy, the Control Technology Center Hotline provides information to state and local pollution control agencies on sources of emissions of air toxics. Sponsored by EPA's Office of Air Quality Planning and Standards in Research Triangle Park, NC, this hotline takes about 100 calls a month, and can be reached from 8:00 a.m. - 4:30 p.m. EST, Monday through Friday.

- Public Information Center (PIC) - 202-829-3535

EPA's Public Information Center (PIC) answers inquiries from the public and Federal agencies about EPA, its programs, and activities, and offers a variety of general, nontechnical information materials. The public is encouraged to reach the PIC through its commercial telephone line or by writing to PIC (PM-211B), U.S. EPA, 401 M Street, SW, Washington, D.C. 20460.

Toll-Free Numbers Offered by EPA's Regional Offices

- General Information Numbers

Five of EPA's 10 Regional Offices offer toll-free numbers providing the public general information on Agency programs, and making referrals as needed. These general information numbers are:

- EPA Region 3, Philadelphia, PA
  800-438-2474 for all Region 3 states (DC, DE, MD, PA, VA, WV)
- EPA Region 4, Atlanta, GA
  800-282-0239 in GA
  800-241-1754 in other Region 4 states (AL, FL, KY, MS, NC, SC, TN)
- EPA Region 5, Chicago, IL
  800-572-2515 in IL
  800-621-8431 in other Region 5 states (IN, MI, MN, OH, WI)
- EPA Region 7, Kansas City, KS
  (Will offer an 800 number by early June 1987, serving the states of IA, KS, MO, and NE)
- EPA Region 8, Denver, CO
  800-332-3321 in CO
  800-525-3022 in other Region 8 states (MT, ND, SD, UT, WY)

- Specialized Information Numbers -

Several EPA Regional Offices sponsor specialized issue-specific toll-free numbers to meet the demands of frequent regional inquiries.

Hotline	Toll-Free & Commercial #s	Description
Region 1 Unleaded Fuel Hotline	800-631-2700 (MA) 800-821-1237 (other Region 1 states - CT, ME, NH, RI, VT)	Enforcement-related line takes calls about tampering with vehicles, pumps, and other problems related to unleaded fuels.
Northeast Industrial Waste Exchange	800-237-2481 (ME, VT, NH, MA, RI, CT, PA, NJ, DE, VA, WV, OH, MD, MI, Washington, D.C.) 315-422-6572 (other states)	Information on waste exchange in the Northeast but with access to other areas. Joins those who generate waste with those who desire waste.
Region 2 Superfund Hotline	800-346-5009 (NJ) 800-722-1223 (NY)	Answers local hazardous waste questions.
Region 3 Waste Minimization Hotline	800-334-2467 (PA) 800-826-5320 (other Region 3 states)	Technical assistance and education on waste minimization.
Region 7 Iowa RCRA Hotline	800-223-0425 (Iowa only)	Information on implementation of RCRA in Iowa
Region 7 Missouri Superfund/ Dioxin Hotline	800-892-5009 (Missouri only)	Information on dioxin and related concerns for contaminated areas in Missouri

Commercial Numbers Offered by EPA's Regional Offices

° A number of EPA Regional offices offer commercial numbers for specific issues or sites.

Hotline	Commercial #	Description
Region 1 (Maine) McKin Site Hotline	207-657-2087	Information on clean-up efforts at Superfund site in Grey, ME.

Region 6 RCRA On-Scene Coordinators' Hotline	214-767-2666 (AK, LA, NM, OK, TX)	Responds 24 hrs. a day to questions and to reports of chemical spills, other emergencies.
Region 9 RCRA Hotline	415-974-7473 (AZ, CA, HI, NV, Guam, American Samoa, Pacific Trust Territories)	Information to Region 9 states on RCRA issues.

APPENDIX F

REPORTING, RECORDKEEPING, AND SELF-MONITORING REQUIREMENTS UNDER THE CAA, CWA, CERCLA AND RCRA

INFORMATION DISCLOSURE REQUIREMENTS UNDER MAJOR FEDERAL ENVIRONMENTAL POLLUTION CONTROL LAWS

The Federal Water Pollution Control Act

33 U.S.C. 1251 - 1376

	SECTIONS	REGULATIONS (40 CFR...)		SUMMARY
Periodic Performance Reporting	33 U.S.C. 1342, 1318 (FWPCA SS 402, 308)	NPDES POTW DMR	122.4 403.12(b-3) 122.41(4)	Periodic reports (DMRs) are required by NPDES permits, and also for any monitoring of discharges to POTWs.
Record Keeping	33 U.S.C. 1342, 1318, 1361 (FWPCA SS 402, 308, 501)	POTW POTW SPCC SPCC	403.12(a) 403.4 112.3 112.7(c)(8)	All information or data used to prepare any report must be kept for at least three years.
Notification and Reports of Problems and Emergencies	33 U.S.C. 132 (FWPCA S 311(b))	NPDES NPDES NPDES POTW Spills	122.41(1)(b) 122.41(n) 122.41(2) 403.12(f) 117.21	In case of emergency, verbal notification to the permitting agency or National Response Center is required within 24 hours. This applies to bypasses under NPDES Permits, slug loads into POTWs and SPCC exception reports.
Reports Required by Specific Orders - Non-enforcement	33 U.S.C. 1318 (FWPCA S308)			The permitting agency may request supplemental information to determine whether a permit is required.

INFORMATION DISCLOSURE REQUIREMENTS UNDER MAJOR FEDERAL ENVIRONMENTAL POLLUTION CONTROL LAWS

The Federal Water Pollution Control Act

33 U.S.C. 1251 - 1376

	SECTIONS	REGULATIONS (40 CFR...)	SUMMARY
Reports Required by Specific Orders Compliance	33 U.S.C. 1318, 1320, 1342 (FWPCA SS 308, 310, 402(k))	POTW 403.12(b)(d)	The permitting agency may request, at its discretion, reports on continued compliance which are in addition to the periodic reports.
Inspection Authority	33 U.S.C. 1318, 1321, 1341 (FWPCA SS 308 (2), 311(m), 401(a)(4) and (b))	Haz. Spills 112.3(c)	EPA or designated state agency may inspect records, or the facility itself, at any reasonable time.
Notification Requirements		403.12(b)(d) and (f)	Notice is required for any nonemergency abnormal discharge or occurrence not specifically permitted.

INFORMATION DISCLOSURE REQUIREMENTS UNDER MAJOR FEDERAL ENVIRONMENTAL POLLUTION CONTROL LAWS

The Comprehensive Environmental Response, Compensation and Liability Act

42 U.S.C. 9601 - 9657

	SECTIONS	**REGULATIONS (40 CFR...)**	**SUMMARY**
Periodic Performance Reporting			CERCLA does not require any type of periodic reporting.
Record Keeping	42 U.S.C. 9603 (CERCLA § 103(d))		Records must be kept by every facility that has treated or stored hazardous substances for 50 years.
Notification and Reports of Problems and Emergencies	42 U.S.C. 9603 (CERCLA § 103)	117.21 300.36 300.64 302.6	When a responsible party learns of any release of a hazardous substance, including toxic air emissions, the National Response Center must be notified immediately.
Reports Required by Specific Orders Non-enforcement	42 U.S.C. 9603 (CERCLA § 103(c))		EPA may ask for information about what and how much hazardous waste is stored from any TSD, or from generators who have shipped their waste to a particular TSD facility.

INFORMATION DISCLOSURE REQUIREMENTS UNDER MAJOR FEDERAL ENVIRONMENTAL POLLUTION CONTROL LAWS

The Comprehensive Environmental Response, Compensation and Liability Act

42 U.S.C. 9601 - 9657

	SECTIONS	REGULATIONS (40 CFR...)	SUMMARY
Reports Required by Specific Orders Compliance	42 U.S.C. 9604 (CERCLA § 104(b) and (e)(1))		The Administrator may order whatever reports he finds necessary to protect the public health or welfare of the environment from any known or suspected release or from a release that may occur.
Inspection Authority	42 U.S.C. 9604 (CERCLA § 104(e)(1) and 104(b))		The Administrator may order whatever investigations he wishes to ensure health and safety. In addition, state officials may also request access to records and to an establishment where hazardous substances are or have been generated, stored, treated, or transported from.
Notification Requirements	42 U.S.C. 9603 (CERCLA § 103(c))		Any present or former generator or transporter of hazardous waste had to notify EPA of all facilities which accepted hazardous waste for disposal or treatment.

INFORMATION DISCLOSURE REQUIREMENTS UNDER MAJOR FEDERAL ENVIRONMENTAL POLLUTION CONTROL LAWS

The Clean Air Act

42 U.S.C. 7401 - 7642

	SECTIONS	REGULATIONS (40 CFR...)	SUMMARY
Reports Required by Specific Orders Compliance	42 U.S.C. 7414, 7542 (CAA SS 114(a)(1), 208(a))	61.54 52.21(n)	Upon request by the Administrator the owner or operator of a proposed source or modification must provide any data or information necessary to perform an analysis of the impact of the proposed change.
Inspection Authority	42 U.S.C. 7414, 7418, 7426, 7542, 7603 (CAA SS 114(a)(2), 118, 126, 208(a), 303)	51.11(a)(5) 51.19(b), (c) 61.33(e)	Provides broad authority to the Administrator or a state official to inspect a facility or its records.
Notification Requirements	42 U.S.C. 7426, 7414 (CAA SS 126(a), 114)	61.09 52.21(m) 61.10 61.33	Owners or operators of proposed facilites must notify EPA or the designated state official prior to: 1) any major construction; 2) any change made in the operation of an air emission source; and 3) any testing (to allow an observer to be present).

INFORMATION DISCLOSURE REQUIREMENTS UNDER MAJOR FEDERAL ENVIRONMENTAL POLLUTION CONTROL LAWS

The Clean Air Act

42 U.S.C. 7401 - 7642

	SECTIONS	**REGULATIONS (40 CFR...)**	**SUMMARY**
Periodic Performance Reporting	42 U.S.C. 7414, 7410, 7542 (CAA §§ 114(a)(1), 110(a)(2)(f), 208(a))	51.11(a)(6) 51.19 Appendix P 61.70 60.08(a) 60.7(c)	Stationary sources are required to provide periodic reports to the EPA region or designated state agency on the nature and amount of emissions from such stationary sources.
Record Keeping	42 U.S.C. 7414, 7542, 7611 (CAA §§ 114(a)(1) 208(a), 311(a))	51.11(a)(5) 51.19 52.21(m) 61.33 61.71 60.07	Stationary sources of air pollution must keep monitoring records including information on start-ups, shut-downs, malfunctions and periods of no monitoring.
Notification and Reports of Problems and Emergencies			(see above)
Reports Required by Specific Orders - Non-enforcement	42 U.S.C. 7414 (CAA § 114(a)(1))	60.7(a)(4)	A report from an existing facility may be requested by the Administrator to supplement notification of a physical or operational change to an existing facility which may increase the emission rate of an air pollutant.

INFORMATION DISCLOSURE REQUIREMENTS UNDER MAJOR FEDERAL ENVIRONMENTAL POLLUTION CONTROL LAWS

The Resource Conservation and Recovery Act

42 U.S.C. 6901 - 6987

	SECTIONS	REGULATIONS (40 CFR...)	SUMMARY
Reports Required by Specific Orders - Non-enforcement	42 U.S.C. 6927, 6934, 6991(d) (RCRA SS 3007(a), 3013, 9005)	TSD - 262.43 TSD - 264.77 TSD - 265.77	A detailed plan of procedures used to analyze waste to determine its nature must be submitted upon request. This is also true of a TSD facility operating log. Also, reports on underground storage tanks.
Reports Required by Specific Orders Compliance	42 U.S.C. 6927, 6991(b), 6991 (d) (RCRA SS 3007, 9003, 9005)	TSD - 264.73 TSD - 265.73	Reports arising from site monitoring for groundwater contamination may be ordered by the Administrator, as well as reports on leaks from TSDs or underground tanks.
Inspection Authority	42 U.S.C. 6927, 6934, 6991(d) (RCRA SS 3007, 3013, 9005)	TSD - 264.74 265.74	Any information relating to hazardous waste must be available for inspection at all reasonable times. This includes access to any facilities or sites for inspection purposes. Beginning November 1985, every permitted TSDF must be inspected every two years.
Notification Requirements	42 U.S.C. 6921, 6930, 6937, 6991(a) (RCRA SS3001, 3010, 3017, and 9002)	T - 263.11 TSD - 264.11 TSD - 264.12	Generators, transporters and TSDs must notify the EPA region or designated state official prior to operation.

INFORMATION DISCLOSURE REQUIREMENTS UNDER MAJOR FEDERAL ENVIRONMENTAL POLLUTION CONTROL LAWS

The Resource Conservation and Recovery Act

42 U.S.C. 6901 - 6987

	SECTIONS	REGULATIONS (40 CFR...)	SUMMARY
Periodic Performance Reporting	42 U.S.C. 6927, 6932, 6922, 6923, 6924, 6925, 6939 (RCRA SS 3007, 3012, 3002(1)(5), 3003(4), 3004, 3005, 3019, 9003)	G - 262.41 G - 262.42 G - 262.43 TSD - 264.75, 265.75, 264.77 265.77	Necessary reports include biannual reports by generators of all hazardous waste shipments sent including amount, type and destination. TSD facilities must periodically report amount of hazardous waste received and may include method of treatment, storage or disposal. Also, risk assessment reports by permitted facilities on estimated human exposures.
Record Keeping	42 U.S.C. 6927, 6934, 6924, 6991d (RCRA SS 3007, 3004, 3013, 9005)	G - 262.40 TSD - 264.73, 265.73 264.15(d)	Records for any testing of waste, and of manifests must be kept for 3 years. In addition, operating logs and records must be kept by each TSD facility, and groundwater must be monitored.
Notification and Reports of Problems and Emergencies	42 U.S.C. 6921, 6922, 6924, 6925, 6991b) (RCRA SS 3001(b)(3) (B), 3002(1), 3004, 3005, 9003)	G - 262.42 T - 263.30 TSD - 264.77, 265.77	Exception reports must be submitted if a manifest is not returned within 45 days to the generator. A transporter must also report any release to the National Response Center. In an emergency at a facility, notification must be given to local officials followed by the National Response Center. Reporting procedures will be developed for leaks from underground tanks.

APPENDIX G

OMB CIRCULAR NO. A-106

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

December 31, 1974

CIRCULAR NO. A-106

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Reporting Requirements in Connection With the Prevention, Control, and Abatement of Environmental Pollution at Existing Federal Facilities

1. Purpose. This Circular provides procedures to be followed by Federal agencies in carrying out the provision of Section 3(a)(3) of Executive Order No. 11752 of December 17, 1973, pertaining to the control of environmental pollution from existing Federal facilities.

2. Rescission. This Circular, supercedes and rescinds Office of Management and Budget (OMB) Circulars No. A-78 and A-81 dated May 18, 1970.

3. Definitions.

a. The term "Federal agencies" means the departments, agencies, establishments, and instrumentalities of the executive branch.

b. The term "facilities" means the buildings, installations, structures, land, public works, equipment, aircraft, vessels, and other vehicles and property, owned by, or constructed or manufactured for the purpose of leasing to, the Federal Government.

c. The term "project" means an action to achieve needed corrective measures relative to identified environmental pollution sources within a Federal facility.

d. The term "cost" means the amount of funds required for putting in place the necessary environmental protection measures. These costs include the capital costs of structure and equipment, irrespective of the appropriation chargeable, but not the annual maintenance and operating costs.

e. The term "lease-construction" means construction of a facility by a private entrepreneur to meet requirements of a Federal agency in consideration of a commitment by the agency to lease the facility at a specified price for a specified time period.

f. The term "Director" means the Director of the Office of Management and Budget.

g. The term "Administrator" means the Administrator of the Environmental Protection Agency.

4. Standards. All facilities are to conform to the requirements specified in Section 4 of the Order. Those requirements are as follows:

a. Federal, State, interstate, and local air quality standards and emission limitations adopted in accordance with or effective under the provisions of the Clean Air Act, as amended.

b. Federal, State, interstate, and local water quality standards and effluent limitations respecting the discharge or runoff of pollutants adopted in accordance with or effective under the provisions of the Federal Water Pollution Control Act, as amended.

c. Federal regulations and guidelines respecting dumping of material into ocean waters adopted in accordance with the Marine Protection, Research, and Sanctuaries Act of 1972, and the Federal Water Pollution Control Act, as amended.

d. Guidelines for solid waste recovery, collection, storage, separation, and disposal systems issued by the Administrator pursuant to the Solid Waste Disposal Act, as amended.

e. Federal noise emission standards for products adopted in accordance with provisions of the Noise Control Act of 1972 and State, interstate, and local standards for control and abatement of environmental noise.

f. Federal guidance on radiation and generally applicable environmental radiation standards promulgated or recommended by the Administrator and adopted in accordance with the Atomic Energy Act, as amended (42 U.S.C. 2011), and rules, regulations, requirements, and guidelines on discharges of radioactivity as prescribed by the Atomic Energy Commission.

g. Federal regulations and guidelines respecting manufacture, transportation, purchase, use, storage, and disposal of pesticides promulgated pursuant to the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended by the Federal Environmental Pesticide Control Act of 1972.

5. - Agency Responsibilities. Pursuant to their responsibilities under the Order, Federal agencies:

a. Should cooperate with State, interstate, and local pollution control agencies and with other Federal agencies in the evaluation of their pollution control needs.

b. May seek the assistance of the Administrator to determine the standards and the appropriate implementation schedules applicable to particular facilities.

6. Pollution Control Plans.

a. Federal agencies must develop plans to assure that their facilities meet the standards listed in paragraph 4 of this Circular.

b. Such plans are to cover existing facilities as defined in paragraph 3b of this Circular. "Lease-construction" is an example of a type of facility covered under this provision, but facilities used under ordinary leases are not covered. Remedial measures required for buildings and equipment owned by non-Federal lessees on Federal land are not to be reported under this Circular unless the responsible Federal agency attests that they are constructed and operated for a Federal purpose. In cases where lease agreements with non-Federal lessees obligate the Federal Government to provide pollution control measures, remedial measures are to be reported under this Circular.

c. The agency plan should include all projects involving "costs," as defined in paragraph 3d of this Circular, which are necessary to bring existing facilities into compliance with applicable standards. Funds required for studies, management and monitoring associated with the definition and development of corrective measures and necessary equipment to assure compliance with standards should also be included in the plan.

d. In determining the most cost-effective remedial measures necessary for a particular facility to meet the standards, agencies should take into account such factors as: the future use of the facility; the best practicable technology available; the need for control system reserve capacity; the various alternative methods of control including process change; and the use of joint or regional pollution control facilities.

e. Agency plans should include the milestones for the design, construction, and completion of projects which, when submitted to the Director, will represent an agency commitment to comply with applicable standards considering the Federal budgetary process and assuming that the requested funds will be appropriated by the Congress and allocated to the agency as planned.

f. Facilities may be exempted from applicable standards in the interest of national security or in extraordinary cases in which it is in the paramount interest of the United States. Such exemptions must be made in accordance with the provisions of Section 5 of the Order.

7. Reports.

a. Agency plans are to be reported in accordance with procedures prescribed by the Administrator. Such procedures will provide for submission of pertinent details of each individual project and a summary status report of the overall plan.

b. The reports will be submitted semiannually on December 31 and June 30 to the Director thru the Administrator. After review of the reports, the Administrator will forward the agency's reports to the Director.

c. By September 30 of each year the Administrator will also forward to the Director an evaluation of each agency's report.

8. Communications with the Administrator. Communications with the Administrator should be directed to the Environmental Protection Agency, attention: Office of

Federal Activities, 401 M Street, S.W., Washington, D.C. 20460, phone 755-0790 (code 138).

9. Communications with the Director. Questions regarding the implementation of this Circular should be addressed to the Office of Management and Budget, Washington, D.C. 20503, phone 395-6827 (code 103).

ROY L. ASH
DIRECTOR

APPENDIX H

DEPARTMENT OF JUSTICE LETTER (10/11/83) AND CONGRESSIONAL TESTIMONY ON FEDERAL FACILITIES COMPLIANCE (DOJ STATEMENT 4/28/87)

United States Department of Justice

ASSISTANT ATTORNEY GENERAL
LEGISLATIVE AFFAIRS

WASHINGTON, D.C. 20530

OCT 11 1983

Honorable John D. Dingell
Chairman
Subcommittee on Oversight
and Investigations
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in response to your letter of August 17, 1983, to Acting Assistant Attorney General Habicht, requesting clarification of the Justice Department's position regarding enforcement actions and the cleanup of federal facilities under RCRA and CERCLA. We will respond separately below to each of the questions posed in your letter. However, I would like to state at the outset that it is this Administration's firm policy that federal facilities have a strong obligation to set an example in meeting the standards which both RCRA and CERCLA impose upon private facilities and that the Administration will continue to make every effort to see that federal facilities set such an example. In fact this Department and EPA have been quite successful in receiving contributions from federal agencies toward the clean up of several hazardous waste sites where multiple generators were involved. In general, federal agencies have demonstrated a positive, cooperative attitude toward the problems presented by their generation and disposal of hazardous wastes. An example here is the Memorandum of Understanding between EPA and the Department of Defense which has recently been finalized. Some agencies have begun clean up of sites owned by them where hazardous wastes have been deposited but for which the agencies were not the responsible generators of the wastes. The Department of Justice may be asked to recover those funds from responsible parties in the future. In short, Executive Branch clean-up efforts are showing concrete results.

> Questions 1 and 2. What is the Department of Justice's policy on suing or bringing enforcement actions under CERCLA and RCRA against federal facilities?

It is generally the policy of the Department of Justice, under this Administration as well as prior administrations, that serve at the pleasure of the President should be resolved internally. If the dispute is legal in nature, it is the policy to proceed as required by Executive Order No. 12146. If the dispute is a matter of conflicting policies or priorities, the practice is to resolve the dispute through existing mechanisms, including the cabinet councils, if necessary. The Department believes that to involve the Judicial Branch in disputes between components of the Executive Branch would constitute a waste of judicial resources and taxpayers' money, as well as result in substantial delays in reaching appropriate and workable resolutions to such disputes. In addition, it is within the authority of the Executive to resolve such disputes internally as a part of its Article II duty to "take care that the laws [are] faithfully executed." Finally, there is a serious question whether such disputes would, in any event, satisfy Article III's justiciability requirements.

This policy applies to disputes under CERCLA and RCRA, as well as to those raised under other statutes.

> Question 3. Please provide a detailed explanation of the legal or other basis behind the policy described in (1) and (2) above.

In addition to the considerations outlined in the response to Questions (1) and (2), there are several sound constitutional and other legal and practical bases for this policy, all of which generally relate to the Executive's constitutional authority and responsibility to see that the laws are faithfully executed. That responsibility is not furthered by the needless resort to the Judicial Branch for resolution of disputes between his subordinates.

As the Supreme Court noted in Myers v. United States, 272 U.S. 52, 161-64 (1926), the whole of the Executive power, created by Article II, is vested exclusively in the President. Included within the Executive power, indeed at its very center, is the obligation to "take care that the laws be faithfully executed," Art. II, §3, which necessarily recognizes the President's authority to exert "general administrative control of those executing the law," i.e., subordinate Executive officers.

Differences concerning whether a federal agency is in compliance with RCRA or CERCLA are appropriately resolved within the Executive Branch, by the President or his delegee, consistent with the Framers' intention that the Executive power of the United States be exercised in a "unitary and uniform" way. Myers v. United States, supra, 272 U.S. at 135. To implement the President's task of coordinating the affairs of the Executive Branch and resolving disputes within it, President Carter issued an Executive Order in 1979 requiring all disputes of a legal nature to be submitted to the Attorney General, to whom he has delegated the responsibility of resolving such disputes, "prior to proceeding in any court." Executive Order No. 12146 provides that:

> 1-401. Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.
>
> 1-402. Whenever two or more Executive agencies whose heads *serve at the pleasure of the President* are unable to resolve such a legal dispute, *the agencies shall submit the dispute to the Attorney General prior to proceeding in any court*, except where there is specific statutory vesting of responsibility for a resolution elsewhere.

44 Fed. Reg. 42652 (1979), *reprinted in* 28 U.S.C. § 509 note (Supp. V 1981) (emphasis added). Section 1-402 mandates that all unresolved legal disputes between agencies "whose heads serve at the pleasure of the President" *shall* be submitted to the Attorney General for resolution *prior to* proceeding in court. This delegation is consistent with 28 U.S.C. §§ 511 and 512, pursuant to which Congress vested responsibility in the Attorney General to render legal advice to the President and to the heads of Executive Departments.

Although the Constitution does not expressly declare that the President must use his supervisory powers to resolve all disputes among his subordinates prior to their resort to litigation, such a resolution by the Executive follows from the Framers' intent that the Executive power of the United States be exercised in a "unitary and uniform" way. See *Myers v. United States*, *supra*, 272 U.S. at 135. In considering the question of EPA enforcement of environmental legislation against federal facilities, former Assistant Attorney General Harmon of the Office of Legal Counsel of the Department of Justice opined:

> The executive power of the United States, which is created by Article II, finds one of its most important applications in the prosecution and defense of court cases on behalf of the United States and the agencies thereof. The question is this: Is it permissible, under Article II, for executive power to be used both to prosecute and to

> defend the same case? Whatever the power of the courts may be, is it within the power of the Executive Branch to sue itself?
>
> * * *
>
> If a decision or action by one of the [President's] subordinates is presented to him for review, it seems to us that if Article II means anything at all, it means that the President has a duty to consider the legality of the decision or action and to request the subordinate to revise the decision or action if it does not accord with law.

Memorandum for the Associate Attorney General, "EPA Litigation Against Government Agencies" at 2-4 (June 23, 1978).

There is, in addition, a very real question whether the Judicial Branch has the power, under Article III, to hear cases brought by one agency subordinate to the President against another subordinate agency. The question is one of justiciability. Such cases, having only one "real party in interest," i.e., the Executive, lack "concrete adverseness" and thereby fail to meet the controversy requirement under Art. III, § 2. See "EPA Litigation Against Government Agencies," supra at 5-8. Moreover, the Judicial Branch may not be granted jurisdiction to decide matters that remain open to revision by the Executive, or are otherwise subject to the President's administrative control. Hayburn's case, 2 U.S. 409 (1792).

Many federal agencies which may need to comply with RCRA or CERCLA are already coordinating their compliance with the EPA. To this end, EPA has been negotiating Memoranda of Understanding with other federal agencies covering response actions at federal facilities. The MOU with the Department of Defense has recently been finalized. The National Response Team, which meets at least monthly to coordinate response programs, provides another forum within which hazardous waste management issues are being addressed. The EPA has announced that it intends to begin integrating any appropriate federal facilities into the National Priority List, promulgated pursuant to Section 105 of CERCLA. We would anticipate that federal agencies involved with sites appearing on the list will continue to cooperate with the EPA to ensure that they comply with their legal responsibilities.

Question 4. Does the Department of Justice concur that Sections 107 and 111 of CERCLA provide statutory authority for EPA to take enforcement and abatement actions against federal facilities?

While it is not clear precisely what is meant by the question, the Justice Department does believe that Sections 107 and 111 of CERCLA provide statutory authority for EPA to take steps to enforce CERCLA and to cause the abatement of practices that are inconsistent with the law. Lee Thomas, EPA's Assistant Administrator for Solid Waste, stated in his August 10, 1983 testimony before the Congress that EPA ha(s) enforcement authority over Federal facilities" and we concur with that statement. We do not, however, believe that this statement included filing actions against other Executive Branch agencies in court. The issue, it seems, is what enforcement tools are necessary or appropriate for one unit of government to use against another. It is the Department of Justice's position that those tools, which include the resolution of interagency disputes according to Executive Order No. 12088 and Executive Order No. 12146, do not include suing an agency of the United States.

Question 5. What is the Department of Justice's position on the applicability of Executive Order 12088, Federal Compliance With Pollution Control Standards, to CERCLA and RCRA?

Executive Order No. 12088 is applicable by definition to RCRA. §1-102(f). While the order was promulgated prior to the enactment of CERCLA, we believe it does apply to that statute as well. The order was intended to be inclusive and not limited to the statutes individually named; such intent is specifically stated in the order. See §1-102 of Executive Order No. 12088. The fact that CERCLA was not passed when the order was issued does not exclude it from coverage since the President has authority under the Constitution to see that the laws are faithfully executed and may delegate that authority. However, EPA's responsibility under Executive Order No. 12088 must be read in conjunction with CERCLA and Executive Order No. 12316.

Question 6. What is the Department of Justice's policy on suing or bringing enforcement actions against government-owned, contractor-operated facilities, such as the Hughes Aircraft Company facility in Tucson, Arizona, and the General Dynamics Company facility in Ft. Worth, Texas?

The Department is prepared to sue government-owned, contractor-operated facilities when the contractor is the responsible party and it is otherwise appropriate to do so. The Department of Justice received a referral from the EPA regarding enforcement of an information request against one company and was prepared to file suit; however, the request was complied with before this became necessary.

Question 7. Does the Department of Justice believe that Executive Order 12146, Management of Federal Legal Resources, is applicable to CERCLA? If so, please describe the circumstances under which it would be applied and describe every instance since January 1981 where it has been applied regarding enforcement, abatement or other response actions against releases of hazardous waste at federal facilities.

As stated in the answer to Questions (1), (2), (3) and (4) above, the Department of Justice believes that both Executive Order Nos. 12088 and 12146 are applicable to CERCLA. Executive Order No. 12146 would be applied whenever a legal dispute existed between agencies, *e.g.*, disputes regarding the meaning and/or applicability of the statute to the agency's program, a disagreement on whether removal was necessary, or whether a certain response action was necessary. To our knowledge, EPA has not requested that the mechanism established under Executive Order No. 12146 be used.

Question 8. In multi-generator cases involving CERCLA or RCRA when a federal agency is one of the largest waste generators at a private disposal site, is there any legal or policy reason for not naming the federal agency as a party defendant along with the non-federal waste generators? If so, please explain the legal or policy reasons.

The legal and policy reasons for not naming a federal agency subordinate to the President as a party defendant in a suit brought by the Department of Justice are the same as those described in the answers to Questions (1), (2) and (3). Even if a federal agency were to be brought into the suit as a co-defendant, the constitutional and other legal issues implicated in such a suit would nevertheless be similar to those raised by a direct suit by a component of one Branch of government suing another component of the same Branch. Recourse to the courts in such circumstances would present the additional disadvantage of wasting taxpayers' resources. Funds appropriated by Congress would be used by the Executive to finance both the effort to convince a court to compel an agency to comply with a disputed legal requirement as well as the effort to defend against such a suit. Citizens would legitimately question such a diversion of resources, when such a dispute could be resolved by the Executive. Finally, it makes little sense to name a Federal agency as a party defendant if the agency is prepared to pay its share of the costs attributable to the cleanup of the site. Voluntary action of this sort is perhaps the most compelling common sense reason for not involving the judiciary in disputes within the Executive Branch.

We hope these answers are responsive to your concerns.

Sincerely,

(Signed) Robert A. McConnell

Robert A. McConnell
Assistant Attorney General
Office of Legislative Affairs

STATEMENT

OF

F. HENRY HABICHT II
ASSISTANT ATTORNEY GENERAL
LAND AND NATURAL RESOURCES DIVISION

BEFORE

THE

SUBCOMMITTEE ON OVERSIGHT AND INVESTIGATIONS
COMMITTEE ON ENERGY AND COMMERCE
HOUSE OF REPRESENTATIVES

CONCERNING

FEDERAL FACILITY COMPLIANCE WITH ENVIRONMENTAL LAWS

ON

APRIL 28, 1987

Mr. Chairman and Members of the Subcommittee:

On behalf of the Department of Justice, I am pleased to have this opportunity to present our views on issues related to federal facility compliance with the environmental laws and regulations. I am committed to helping the Congress work through these most important issues and to achieving the desired compliance in the most effective possible way.

In today's testimony, I will discuss the Justice Department's views on environmental compliance and enforcement, both generally and as they address federal facilities. In order to be most helpful to the Subcommittee, I will attempt to lay a foundation for the Subcommittee's questions by addressing special institutional characteristics of federal agencies -- their political accountability and the unique role of Congress in setting, with the Executive, their missions and budget. To complete this foundation, my testimony will then turn to the commitment and work of the Lands Division to ensure environmental compliance by the entire regulated community, with particular attention on our efforts to promote compliance by federal agencies. In this regard, I will outline the numerous ways in which federal agencies are accountable to the public and the Congress, including what enforcement tools are available to the States, citizens and EPA to secure compliance by federal facilities. I will then proceed to respond to the Subcommittee's specific factual and legal questions. It is my earnest hope that through this testimony and in response to your questions today, we can develop a common understanding of the significant issues in this area, so we can work together -- as we must -- to achieve the best possible compliance results in the most efficient and effective manner. I hope that you find this testimony helpful.

Because this hearing concerns environmental compliance and enforcement generally, I think it is important to share with the Subcommittee my perspective on environmental compliance and enforcement across the board, with particular emphasis on our commitment to ensure that federal facilities set an example of compliance. As a matter of first principles, this Administration, and the Lands Division in particular, is strongly committed to full compliance with the environmental laws by both private parties and government entities. In the last six years we have successfully prosecuted more people and corporations for criminal violations of the environmental laws than ever before, obtaining over 257 guilty pleas and convictions since 1981 that resulted in over $3 million in fines and almost 150 years in jail sentences. We have also filed more civil environmental enforcement suits than ever before -- over 1000 since 1981. Through the Chairman's lead role in the Superfund reauthorization process you are aware of our strong stance on Superfund enforcement issues, and in our hazardous waste cases alone, we have obtained court-ordered cleanups valued at over $400 million. Federal entities must abide by the same laws. Not only do the statutes require it, but good public policy dictates that the federal government set an example for the private sector in proper hazardous waste management.

For federal facilities, strict compliance with all substantive requirements is our goal, just as it is for private facilities. However, important constitutional, statutory, and public policy considerations all dictate that the means employed to achieve this goal will in certain respects be different from the procedures used in securing private compliance -- although they are clearly comparable. This is because federal facilities are not the same as private facilities; they are distinct for several reasons which I will outline briefly. Nonetheless, the end result, and the commitment to reach that result, must be -- and is -- the same.

When Congress creates a federal agency, it takes a very significant step reflecting the judgment that the underlying mission is a special one which cannot be entrusted to the private sector. Typically, federal agencies have been established by Congress to fulfill a certain mission: the Defense Department to protect the national security, the Environmental Protection Agency to protect against environmental degradation, the Department of Energy to promote the production of and the regulation of energy sources and supply. In contrast, the mission of General Motors, for instance, is to make cars. But GM is not the only automaker and if it stopped production tomorrow, Americans would not stop driving. If the Defense Department stopped defending the United States tomorrow, we would all agree, I believe, that the nation would be notably less secure. No substitute enterprise could rise to fulfill the mission.

There are other differences. Federal agencies are created by Congress and are supported solely by Congressional appropriations. They cannot, when faced with a demand for millions or even billions of dollars for hazardous waste cleanup simply raise the prices on their products, dip into last year's profits or stockholders equity to cover the tab, or ultimately declare bankruptcy. The only funds they have available for environmental compliance are those appropriated by Congress. Thus, Congress plays an important role in assuring that environmental compliance occurs by working with the Executive Branch to appropriate sufficient funds to assure these desired results. For example, the Department of Defense has received in FY87 $377 million for the DOD installation environmental restoration program. This money helps ensure that DOD facilities achieve compliance with the relevant statutory requirements of RCRA and CERCLA. In addition, the recently enacted Superfund amendments created a "Defense Environmental Restoration Program" which requires DOD, in consultation with EPA, to undertake an environmental restoration program at all DOD facilities and to perform appropriate response actions to releases of hazardous substances. The law also established a DOD research, development, and demonstration program for hazardous substances. Finally, it created a special account within DOD to finance the environmental restoration effort. Similarly, the DOE has presented testimony here today on its environmental compliance programs.

Thus, Congress, by outlining the specific public interest mission of the federal agency and by appropriating the requisite funds, is an integral partner in bringing about compliance at federal facilities. While in some ways it is more cumbersome for a federal agency to find the money necessary to comply with environmental laws than it is for a private company, federal agencies have an added incentive to comply: they must be accountable to Congress, to the President, and above all to the American people for any failure to comply. While litigation, or the threat of some coercive enforcement action, may be the best means to pressure private companies to comply, we should recognize the unique political accountability of federal facilities. This ability of Congress and the people to call government agencies to account for their actions or neglects provides a compelling enforcement tool. At the same time, this unique accountability reaffirms the importance of Congress acting as a partner with the agencies in seeing that established environmental priorities are being met.

Most importantly, federal agencies report to the President, who is accountable under the Constitution for their missions and actions. At times, agency missions, which Congress set forth by statute, can conflict and the resolution of those conflicts by the President is one way in which these agencies differ from private facilities. In light of this, as demonstrated further below, appeal to higher Executive authority, and ultimately to the President, is an additional mechanism to ensure federal facility compliance -- an enforcement tool not reasonably available against private parties. Often, this intra-Executive Branch approach will be the most effective and efficient means of ensuring federal facility compliance. Moreover, as I will discuss later in this testimony, this process obviates the necessity to delay compliance in order to resolve complex legal issues or interagency differences in a costly adversarial process.

Another difference between public agencies and private parties is that the sovereign is immune from suit. This legal doctrine, going back to the foundation of the Republic, applies to all public agencies, except to the extent that sovereign immunity has been specifically waived by Congress. Thus, in each statute we must carefully analyze the degree to which Congress exposed federal agencies to liability. Congress has made clear that agencies must comply with the laws, but what differentiates federal agencies from private parties is the very long-standing and established rule of statutory construction that courts must interpret any waivers of sovereign immunity strictly and narrowly. See, e.g., Hancock v. Train, 426 U.S. 167 (1976). This rule reflects the proper role of the judiciary in our federal government and a reluctance on the part of the courts to infringe on Congress' constitutional authority to decide, for example, how government funds may be spent. Unless Congress has made a clear decision that it intends funds to be spent in a specific manner, the courts are loathe to make that decision for Congress. This protects congressional prerogatives by retaining for Congress, and only for Congress, the ability to control the federal treasury. U.S. Const., Art. I, Sect. 9.[1]

Although practical realities require that we recognize these inherent distinctions between private entities and federal agencies, they do not interfere with the Justice Department's strong commitment to fostering environmental compliance. The Attorney General is the chief legal officer of the United States, and, as such we in the Justice Department have a paramount responsibility to see that the laws of the United States are faithfully executed. It is the law enforcement elements of this responsibility that I view as the Lands Division's largest single task. Indeed, this can be seen in the resource allocation within the Division: civil and criminal enforcement activities have the lion's share of the Division's resources.

---

[1] Some have criticized the Department for utilizing the well-settled law of sovereign immunity to protect the public fisc against civil penalties. To prevent this purely legal issue from interfering with expeditious compliance, we have proceeded directly to take steps to conform with the substantive requirements of the law, while at the same time testing in litigation the narrow issue of whether certain of the federal environmental statutes have waived sovereign immunity for the payment of civil penalties. I note that courts have consistently shared our view of the law and concluded that such immunity has not been waived under the Clean Water Act or RCRA. See, M.E.S.S. v. Navy, 25 E.R.C. 1480 (E.D. Cal. 1986); Meyers v. Coast Guard, 644 F. Supp. 221 (E.D.N.C. 1986).

I must emphasize, as I have in my communications to State Attorneys General and others, that our position regarding civil penalties is not intended to shield federal agencies from effective compliance with environmental laws. By severing this issue, through pretrial motions, I am committed to meeting all of my obligations faithfully to uphold the law. We can litigate the narrow penalty issue without delaying the development of a necessary environmental remedial plan to ensure compliance with the law.

Although the Land and Natural Resources Division represents many agencies in a broad spectrum of cases ranging from public lands and natural resource questions to Indian claims issues, the client to which we devote most litigation and management attention is the Environmental Protection Agency (EPA). We not only represent EPA in enforcement litigation under the environmental laws, but also defend the regulations, programs, policies, and decisions of the EPA.

Commensurate with its enforcement duty, the Lands Division -- in close and effective partnership with EPA -- has regularly argued in the Federal courts for the broadest interpretation of the environmental statutes consistent with the apparent intent of Congress. In this respect, the Division has been singularly successful in its litigation. I point with pride to very favorable decisions regarding the liability standard under Superfund, and a consistent string of victories in Clean Air Act, Clean Water Act and RCRA cases.

My staff vigorously defends EPA's substantive standards, embodied in rulemakings. We have successfully defended challenges to the National Contingency Plan, the National Priorities List, regulations under RCRA, the Clean Air Act, the Clean Water Act, all of which establish the substantive standards to be followed by all parties -- federal and private. In prosecuting cases, or defending EPA's authority to impose requirements on private parties under RCRA, CERCLA, and other laws, we have firmly established the substantive standards of environmental law. I look with pride to the cases, culminating in the Supreme Court's denying certiorari, which protected EPA's authority under Section 106 of CERCLA from preemptive challenges by responsible parties. See, *e.g.*, *Lone Pine Steering Committee v. EPA*, 600 F. Supp. 1487 (D.N.J.), *aff'd*, 777 F.2d 882 (3rd Cir. 1985), *cert. denied*, 106 S.Ct. 1970 (1986). Through these victories, the Division has sent a signal to the regulated community -- both private and federal -- that the Department takes environmental enforcement very seriously. It has also ended uncertainty over the contours of liability under the environmental laws, thus promoting swift compliance as all parties understand what the law demands of them.

At this juncture it bears emphasis that these same laws, and the court rulings secured under them, apply to federal agencies. Our responsibility to defend Federal facilities has not led the Division to temper its enthusiasm for a legal regime that demands strict environmental compliance. To the contrary, and allow me to be very clear on this point, the Justice Department does not support one meaning of a statute in one action and another in different lawsuit. The United States government has an obligation to the public it serves to decide on a view of the law and adhere to that view in all its dealings with the courts and the public.

Indeed, avoiding harmful inconsistency in this area is a crucial reason for centralizing litigation authority in one Department. The benefits that this provides the federal government are legion. The United States enjoys an enhanced credibility in litigation because it speaks with a single voice in the courts. This promotes a uniform understanding of the law, developed with a government-wide perspective by experienced, full-time trial attorneys. There can be little question that the impressive string of victories that have established the enforcement rules under Superfund and other environmental laws were secured by exploiting these advantages, in critical partnership with the expert professionals at EPA.

The Lands Division is also responsible for providing legal advice to our clients, representing the federal agencies in environmental matters, and advising them on compliance with the law. The defense of federal agencies consumes considerably less of the Division's resources and time than does environmental enforcement efforts.

Cases involving the government's compliance with environmental laws may arise in a number of ways. In each instance, however, it is my objective to assure that the same exacting substantive requirements which are met by private parties apply to the federal government. We do not argue conflicting positions on the appropriate standards to be met for federal agencies as compared to private parties. That being said, let me describe the kinds of cases which are handled in my office and give some illustrations of how they are handled.

Currently pending are approximately 80 cases or matters involving federal facility environmental compliance. I note that this is but a small percentage of the total workload of the Environmental Defense Section, which has approximately 1300 cases pending annually. Approximately 20 of those matters involve situations either where a federal agency has received a notice of intent to sue pursuant to a citizen suit provision, or where a federal agency has simply requested our advice independent of any filed litigation. In those latter instances, my offices may provide advice to the agency regarding the law relevant to the particular problem. Yet, because there is no lawsuit pending, our role is purely advisory and is not central to resolution of the issue. We commonly employ this opportunity to ensure that the agency takes the notice letter seriously and commences the steps necessary to achieve compliance with the law or otherwise resolve the dispute. Because we are closest to the rapidly developing substantive law under these statutes, we can alert the agencies to the most recent cases, regulations, or EPA policy documents addressing their problem. Additionally, we can advance compliance by placing federal agencies in contact with the appropriate staff at EPA. The Division uniformly advises agencies that they cannot avoid compliance with the law and should be aware that, in the event a lawsuit is filed, the Department will refuse to assert frivolous defenses or make legal arguments that conflict with positions that we take in EPA enforcement cases. This generally has the salutary effect of helping the agency to make a realistic assessment of the problem and often results in discussions between the parties which avoids litigation and concludes in a more effective, more expeditious resolution of the problem. In part as a result of our efforts, I note that most notices of intent to sue do not ripen into lawsuits.

There are also approximately 30 cases in which the United States has filed an action against private parties responsible for a hazardous waste problem, and these parties, in turn, have brought federal agencies into the suit as either third party defendants or by way of counterclaims against the United States. In these cases there is rarely an issue of liability -- if the federal agency is a generator, it will pay its appropriate share. As a result, federal generators have contributed to settlements at major sites like the Conservation Chemical Corporation site in Kansas City, the Chem Dyne site in Ohio, and many others. Federal generators have for the most part been relatively small contributors to a number of our enforcement sites. Occasionally, however, the federal activity generated a larger amount of the waste. It appears that the Hardage site is such a situation, where the federal contribution may be approximately 3%. At a site like Stringfellow, for example, Air Force generated wastes represent approximately 3.9%. The Air Force already committed over $4 million toward its contribution for clean up. Even without litigation, at a site like the Bio-

Ecology site in Texas, Air Force, which may have contributed as much as 38% of the waste by volume, has agreed with EPA to pay its share of the RI/FS costs. In these instances, the federal agencies will try to meet their obligations through appropriate funding of remedial activity.

As these examples illustrate, neither I, nor any of my colleagues here today, will tell you that in the past federal agencies have always attained the standards of environmental protection to which they must be held. But as problems and issues have become apparent we have sought and found ways to get results. Over the last five years, using non-litigative strategies, federal agencies have made great strides in developing responsible compliance programs. For example, the Department of Defense under Superfund has initiated 3,500 preliminary investigations, 3,100 remedial investigations and feasibility studies, 407 remedial actions, and completed 99% of those remedial actions. The Department of Energy has also taken impressive steps toward hazardous waste compliance and they are here today to explain those efforts to you.

In addition to the governmental PRP's, the cases described above often involve private parties with government contracts, who perform substantial amounts of work at federal facilities. Let me assure the Congress that while we have identified inescapable legal and institutional distinctions between federal agencies and private parties, those distinctions do not apply to government contractors, and the Justice Department does not treat the government contractor fundamentally different than any other private party for purposes of law enforcement. In connection with federal contractors, the Subcommittee has requested that an outline of the general procedures for enforcement litigation referrals from EPA, which we have set forth in detail in Appendix "A" to this testimony. As you will note, the very same procedures apply to all actions against private parties, including government contractors (GOCOs).

Of the 80 matters mentioned previously involving federal facility compliance, we have approximately 20 active cases pending which deal with problems arising on federally owned and/or operated facilities. These include sites like Rocky Mountain Arsenal, Twin Cities Army Ammunition Depot, the Department of Energy facilities at Fernald, Ohio and Savannah River Plant in South Carolina, as well as other government property held and managed by various federal agencies. Once again, in these cases our objective is to obtain effective compliance with the law in an orderly way, consistent with the substantive requirements of the relevant statutes. We do this through fully assessing the cases, encouraging the agencies to work with their experts and with EPA to determine how a problem can best be addressed, and by discussing and negotiating with opposing parties on what steps to take toward compliance. At the same time, we seek to carve out those extraneous issues that do not address questions of substantive compliance and on which we do not agree -- such as liability for civil penalties -- through early, focused motions to dismiss or for partial summary judgment. This approach enables us to separate the areas of disagreement from those areas where we can agree. In most cases this approach has led rapidly to either consent decrees or ongoing negotiations in which the parties reach agreement on the technical requirements necessary to resolve a problem.

Let me give but a few examples.

We take very seriously the lawsuits brought and the concerns expressed by the Congress and the public regarding the Energy Department's facilities at Fernald, Ohio and at the Savannah River Plant in South Carolina. We have worked closely with the Energy Department at each facility to assure that they have embarked on schedules for investigating and remedying any environmental problems or non-compliance identified in those suits. For example, the state of Ohio filed its lawsuit in March 1986. By June 1986, the Energy Department and EPA Region 5 had entered into a federal facilities compliance agreement to govern problems under RCRA, CERCLA and the Clean Air Act. We offered Ohio the opportunity to enter into this agreement, and since June 1986, we have also offered to the State at least three draft consent judgments in this matter. For the most part, the parties have agreed on the technical steps necessary to achieve compliance, the remaining stumbling blocks are primarily specific legal questions -- such as penalties -- which I firmly believe should not impede swift compliance with the law. Accordingly, in the meantime, while there are pending motions on the penalties and other issues, the Energy Department, with our encouragement, is complying with the technical aspects of the agreement that it has negotiated with EPA and with the promises that it has made to the State.

Similarly, with regard to the Savannah River Plant, we have been negotiating with the plaintiffs, Natural Resources Defense Council and the State of South Carolina, to achieve a consensual resolution. Without disclosing settlement discussions, I can express that there appears to be technical agreement in that case as well and I am hopeful that resolution will be achieved.

In fact, we either have entered into consent decrees or are in the process of both negotiating such decrees and embarking on steps toward compliance in each of our federally owned facility lawsuits. You may ask why there are not resolutions in every instance. Candidly, at large facilities, particularly those which have been in operation for many years, all environmental problems are not solved instantaneously. We face exactly this difficulty in our private litigation, as well as with federal facilities. While we surely desire immediate compliance, to do the job right everyone needs to know the full extent of a problem before commencing a remedy. Thus in lawsuits, as is true in the absence of litigation, the government first fully assesses the extent of any environmental problem, and then expeditiously moves to remedy it.

Moreover, as a litigator, I fully recognize that parties to a lawsuit will not enter into consent decrees if they are uninformed or less than fully informed. My point in emphasizing negotiated resolution of federal facility compliance suits is not to bulldoze parties precipitously into agreements. Rather I want to be clear that we are ready to enter into consent decrees that apply the same substantive standards to government compliance as exist for private parties.

Trial of any environmental compliance lawsuit is time-consuming and costly to all parties, including the courts. Our objective where federal agencies are sued because of alleged non-compliance with environmental laws is to utilize all available tools -- including agreements with EPA, consent decrees, negotiations among interested parties, pre-trial motions -- to avoid protracted litigation that might delay effective compliance, or waste precious resources. We are interested in seeing the agency quickly address the problem so that neither the parties, the community nor the courts need to expend resources on such cases.

You have asked what role the Lands Division played in the agreement reached between the Department of Energy, the EPA and the State of Colorado concerning the Rocky Flats facility. Where there is no pending litigation, my staff is not generally involved in either administrative or intergovernmental discussions between federal agencies and either EPA or state agencies. From time to time, however, we receive requests for informal advice from agencies regarding environmental issues. We routinely advise such agencies that they must meet the substantive requirements of applicable environmental laws.

In the Rocky Flats circumstance, it is my understanding that all parties had reached agreement regarding the technical steps that were necessary, but consummation of that agreement was being delayed, in part, because of the label to be placed on the instrument. There were questions raised near the end of negotiations as to whether there was authority under RCRA for EPA to issue "orders" to another federal agency, and what the precise legal consequences would be of issuance of orders to federal agencies. Rather than have such a dispute delay prompt consummation of an agreement which all parties seemed to desire, we recommended that it be signed as an "agreement", rather than an "order".

We were also consulted with regard to provisions in the Rocky Flats agreement concerning citizen enforceability. There we recommended that the agreement include language parallel to that found in the citizen suit provision of RCRA, providing that requirements of RCRA embodied in such agreements are subject to citizen enforcement. We fully support the concept that federal agencies must be accountable to the public for their compliance with the law, and recognize that citizen enforcement is an important tool to achieve this accountability.

It is my understanding that the parties to the Rocky Flats agreement are pleased with its terms and its implementation. The agreement enabled the federal government to avoid unnecessary litigation with the State of Colorado, and established an enforceable instrument to govern Energy's compliance. These are the objectives we seek to achieve in all such cases.

Moving from specific matters to our broad approach to achieving federal facility compliance, I firmly believe -- and this is also reflected in the Division's successful strategy in obtaining environmental compliance for private facilities -- that litigation, or other types of coercive enforcement, should always be the last resort, rather than the first resort. For federal facilities, this is especially apparent -- a process involving consensual agreements, subject to public accountability and the discipline of citizen enforcement, is far more likely to produce quick and efficient compliance than a contested proceeding.

I believe that agreements reached through the process provided for in the proposed memorandum of understanding (MOU) worked out among interested agencies will assist in bringing federal facilities into environmental compliance in the most expeditious and efficient manner. To be sure, this process evolved in part from legal concerns (both constitutional and statutory) about the use within the Executive Branch of certain enforcement tools in a manner oblivious to the differences between federal agencies and private parties outlined above. However, it became clear that an MOU process was -- independent of the legal concerns -- a better and quicker way to secure compliance than an administrative hearing and judicial review process which would unnecessarily drain resources. To ensure that the President has the opportunity to resolve disputes within the Executive Branch, it is important to establish a process which can both track the steps applied to private parties, yet account for this significant constitutional dimension. Thus, under the MOU which we have been developing with EPA and other federal agencies, EPA would be able to send notices to agencies identifying possible violations or deficiencies. If the response was not sufficient to satisfy EPA, that agency could propose findings of violation and propose remedies, just as it can for private parties. At each stage, a set amount of time would be permitted for negotiation of compliance agreements. If significant policy issues were involved, there would be an opportunity for elevation of the dispute as provided in Executive Order 12088. I am confident that very few issues of environmental compliance would require this level of review, but prudent, constitutionally valid management of the government requires that such an opportunity be provided. I note that under this process the resolution of environmental matters would be subject to public review and the terms of the resulting compliance documents can be invoked in citizen suits to enforce the statutory requirements of RCRA.

The MOU process outlined above, however, has more to recommend it than the practical realities of more timely compliance. It also avoids substantial statutory and constitutional problems associated with intra-Executive Branch orders. Indeed, an answer to your first question -- requesting the Department's legal opinion as to the authority of the

Environmental Protection Agency ("EPA") to issue administrative orders to other federal agencies under section 3008 of the Resource Conservation and Recovery Act ("RCRA") and section 106 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") -- highlights some of these difficult legal problems. The answer to this question is complex, requiring interpretation of often ambiguous provisions of complicated statutes in light of certain well-established and important constitutional principles. Allow me to begin, however, by outlining some relevant authorities that the EPA clearly can exercise consistent with the statutes and the Constitution.

First, EPA's authority to issue administrative orders to other federal agencies under CERCLA section 106 is straightforward. Section 106 of CERCLA provides, in pertinent part, as follows:

> [W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility he may [take] action under this section including, but not limited to, issuing such orders as may be necessary to protect the public health and welfare and the environment.

42 U.S.C. 9609(a). The statutory term "facility" is very broadly defined and encompasses federal facilities. 42 U.S.C. 9601. All section 106 authority is, of course, vested in the President. In Executive Order 12580, however, the President has delegated his power under CERCLA section 106(a) to "the Coast Guard with respect to any release or threatened release involving the

coastal zone, Great Lakes waters, ports, and harbors," and to the Administrator of the EPA otherwise. Consistent with EO 12146, the President's delegation recognizes a role for the Attorney General when orders are to be issued to other executive agencies.

Second, there can be no doubt that RCRA 6001 has waived the United States' sovereign immunity as to the statutory requirement of EPA-issued permits. Insofar as EPA, or the States, in their permitting process establish or modify permit conditions, or provide for variances from permit standards, those documents can be statutorily issued to federal agencies without running afoul of the government's sovereign immunity. For example, federal facilities can be subject to "corrective action orders" under §3004 (u) and (v), as part of the permit process.

EPA can also enter into compliance agreements with other federal agencies under the MOU process outlined above. RCRA section 6003, entitled "Cooperation with Environmental Protection Agency," contemplated federal agency cooperation with EPA in ensuring RCRA compliance. 42 U.S.C. 6963(a). Certainly, the MOU and the resulting agreements concerning compliance with RCRA constitute the kind of cooperation between EPA and federal agencies envisioned by section 6003. Indeed, even absent statutory authorization, this process would be constitutionally appropriate. Where EPA and the other federal agency have reached a determination as to the steps that a federal facility must take to achieve compliance, they can agree -- where appropriate -- that those steps are "requirements" under the statute. Moreover, the compliance document can reflect an Executive determination of the "requirements" of the statute and, as such can be invoked by private citizens in lawsuits brought under section 7002 to vindicate their statutory rights. Under their statutory and constitutional authority, Executive Branch agencies are free to denominate the document that results from the MOU process as an "Executive Compliance Order" or "Executive Compliance Agreement."

Having outlined important elements of the "order" authority that EPA does have under these statutes, I must also emphasize that Justice Department analysis of RCRA, in response to your request, indicates that §6001 has not effectuated a complete waiver of sovereign immunity that extends to all manner of "compliance" orders. For example, as noted earlier, documents under various labels set forth the requirements that all must meet under RCRA. These documents include regulations, permits and related elements of the permit process that establish requirements for a particular facility. A very important type of RCRA orders -- corrective action orders -- delineate requirements to which facilities are subject and as such clearly seem to be within the waiver of sovereign immunity. The "orders" described in §3008(a), in contrast, primarily concern the imposition of enforcement sanctions -- usually penalties -- for "persons" who are "in violation of a requirement." Indeed, this is clear from the language of §3008(a), "the Administrator may issue an order assessing a civil penalty for any past or current violation." (emphasis added). As we have noted, however, several courts have found that penalties are not within the scope of RCRA's waiver of sovereign immunity, reasoning in part that sanctions to enforce requirements are distinct from the "requirements" themselves. See, e.g., California v. Walters, 751 F.2d 977 (9th Cir. 1984) ("Criminal sanctions * * * are not a "requirement" * * * within the meaning of [section 6001], but rather the means by which the standards, permits, and reporting duties are enforced"); Meyer v. Coast Guard, 24 E.R.C. 2013, 2014 (E.D. N.C. 1986); Florida Department of Environmental Regulation v. Silvex Corp., 606 F. Supp. 159 (M.D. Fla. 1985). See generally Appendix B.

While a formal legal opinion on such a complex question of statutory interpretation would require additional time, I believe it important to set forth for the Subcommittee our analysis, undertaken consistent with the settled rules of construction for any statutory waiver of sovereign immunity. I have done so in Appendix "B" of this testimony. I believe, however, that whether EPA can issue all types of compliance orders to federal agencies under §3008 is not the real issue. Instead, the true concern is ensuring that there is an adequate mechanism to get results: to guarantee that federal facilities meet the underlying statutory requirements. Unquestionably, the federal agencies must comply with the statute, EPA regulatory requirements, conditions contained in permits, and corrective action requirements. Thus, even absent application of every type of §3008 compliance order to federal facilities, the above discussion of EPA's authorities demonstrates that ample tools and means exist to secure swift compliance and accountability.

I hasten to add that the Constitution requires a process that protects the President's ability to take care that all laws are faithfully executed, and hence, to manage the Executive Branch. The Justice Department has examined this matter, in response to your request for a legal opinion, and it is our conclusion that even where statutory order authority exists, the exercise by EPA of unilateral order authority would be clearly inconsistent with existing Executive Branch dispute resolution mechanisms, and would raise substantial constitutional questions. This Department has consistently taken the position that under our constitutional scheme, disputes of a legal nature between two or more Executive Branch agencies whose heads serve at the pleasure of the President are properly resolved by the President or by someone with authority delegated from the President. [2]

---

[2] Executive Orders 12146 and 12088 provide a mechanism whereby agencies may submit their disputes concerning compliance with the environmental laws to the Attorney General or the Director of the Office of Management and Budget, respectively.

Executive Order No. 12146 provides that:

> 1-401. Whenever two or more Executive agencies are unable to resolve a legal dispute between them, including the question of which has jurisdiction to administer a particular program or to regulate a particular activity, each agency is encouraged to submit the dispute to the Attorney General.
>
> 1-402. Whenever two or more Executive agencies whose heads serve at the pleasure of

(continued...)

The President's authority to require Executive Branch agencies to submit their legal disputes to him or his delegate for resolution derives from his Article II duty to "take Care that the Laws [are] faithfully executed," as does his responsibility to supervise the affairs of the Executive Branch. This obligation necessarily recognizes the President's authority to exert "general administrative control over those executing the law." Myers v. United States, 272 U.S. 52, 161-164 (1926). The President, as head of the Executive Branch, must "supervise and

---

[2] (...continued)

> the President are unable to resolve such a legal dispute, the agencies shall submit the dispute to the Attorney General prior to proceeding in any court, except where there is specific statutory vesting of responsibility for a resolution elsewhere.

44 Fed. Reg. 42652, reprinted in 28 U.S.C. 509 note.

Executive Order No. 12088 provides that

> 1-502. The Administrator [of EPA] shall make every effort to resolve conflicts regarding such violation [of an applicable pollution control standard] between Executive agencies . . . If the Administrator cannot resolve a conflict the Administrator shall request the Director of the Office of Management and Budget to resolve the conflict.
>
> 1-603. The Director of the Office of Management and Budget shall consider unresolved conflicts at the request of the Administrator. The Director shall seek the Administrator's technological judgment and determination with regard to the applicability of statutes and regulations.

43 Fed. Reg. 47707. We acknowledge that the conflict resolution procedures set forth in Exec. Order No. 12088 "are in addition to, not in lieu of other procedures, including sanctions, for the enforcement of applicable pollution control standards."

guide" executive officers in "their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contemplated in vesting general executive power in the President alone." Id. at 135.[3]

The President's use of his Article II supervisory powers to resolve disputes among his subordinates also follows from the Framers' intent that the executive power of the United States be exercised in a "unitary and uniform" way. Myers, 272 U.S. at 135. The basic principle underlying Article II of the Constitution, is that the Executive power is vested in a single person, the President, or as James Madison stated during the Great Debate of 1798, "the great principle of unity and responsibility in the Executive department." 1 Ann. Cong. 499 (1798). Simply put, the executive power under our Constitution is based on this principle of the unitary executive. The Framers deliberately chose this principle and deliberately rejected the cabinet (or privy council) alternative, with which they were quite familiar from British practice and from the constitutions of most of the original states.

---

[3] The supervisory authority recognized in Myers is based on the distinctive constitutional role of the President. The "take Care" clause charges the President with the function of coordinating the execution of many statutes simultaneously: "Unlike an administrative commission confined to the enforcement of the statute under which it was created . . . the President is a constitutional officer charged with taking care that a 'mass of legislation' be executed," Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 702 (1952) (Vinson, C.J., dissenting).

One of the main reasons the Framers chose to create a unitary executive was that they believed that unity in the executive would promote what today we call "accountability." As Alexander Hamilton pointed out, the more that the executive power is watered down and distributed among various persons, the easier it is for everyone concerned to avoid blame for failure to comply with the rule of law. The Federalist No. 70, at 427-428 (A. Hamilton) (C. Rossiter ed. 1961). Hamilton stated that "one of the weightiest objections to a plurality in the executive . . . is that it tends to conceal faults and destroy responsibility." Id. at 427. To ensure accountability to the President, the Constitution, as interpreted by the courts, vests him with the powers of appointment and removal, the power to demand written opinions from executive officers, and the right to invoke executive privilege to protect consultative privacy.

In our view, if the intentions of the Framers are to be fulfilled, the President must have an unfettered opportunity to take action in the event of disagreements or disputes within the Executive Branch. The President has the responsibility of making certain that that Branch speaks with one voice. He can do that by settling the controversy himself, or by establishing procedures, as he has done by Executive Order, for the resolution of controversies by one of his principal officers. In this way, conflicts within the Executive Branch are resolved internally, under the supervision of the President or his delegate, and not in the courts.

The President is accountable to the American people for the activities of all Executive agencies. Thus, the President has the ultimate duty to ensure that federal facilities comply with the environmental laws as part of his constitutional responsibility under Article II, even though Executive Branch agencies are subject to EPA's regulatory oversight. Accordingly, Executive Branch agencies may not sue one another, nor may one agency be ordered by another to comply with an administrative order without the prior opportunity to contest the order within the Executive Branch. Thus, coercive unilateral order authority is inconsistent with the constitutional principles of unity and unitary responsibility within the Executive Branch.

Indeed, the question of the constitutionality of administrative order authority is a variation on the question of the constitutionality of EPA's authority to bring an enforcement action against a federal agency in court. Unilateral administrative orders, like lawsuits, are enforcement tools that interfere with the management of the Executive Branch by the President. We have previously advised you, in the context of EPA judicial enforcement of environmental legislation against federal facilities, that

> If a decision or action by one of [the President's] subordinates is presented to him for review, it seems to us that if Article II means anything at all, it means that the President has a duty to consider the legality of the decision or action and to request the subordinate to revise the decision or action if it does not accord with law.

Memorandum for the Associate Attorney General, "EPA Litigation Against Government Agencies" at 2-3 (June 23, 1978). We think that this analysis applies with equal force to coercive EPA administrative orders.

This is not to suggest that the Constitution shields federal facilities from compliance with the environmental laws. The constitutional infirmity in unilateral orders is their interference with the President's power to manage the Executive Branch. Insofar as RCRA allows citizens to sue to enforce unilaterally-issued, contested administrative orders as soon as they are violated, such a regime would lead to the judiciary resolving an intra-Executive Branch dispute before the President had a full opportunity to exercise his constitutional authority. In light of this, the challenge to those of us in the Executive Branch charged with the responsibility of ensuring federal facility compliance with the environmental laws became to fashion a system that could pass constitutional muster and still provide an effective enforcement sanction against federal agency non-compliance. For the reasons explained above, I believe that the proposed MOU process that the EPA, Department of Justice and other federal agencies have developed meets this difficult challenge. Under this procedure, the Executive Branch speaks with a single voice. At the time of the consummation of the agreement, the Executive has one view of the requirements of the law. During the negotiation process, if the agencies disagree, they are free to appeal to the President to settle the dispute.

In this manner, the President's constitutional prerogatives are protected, but at the same time, there exists an adequate enforcement mechanism, In a practical sense, these agreements constitute determinations by the executive branch as to the precise meaning of the statutory requirements. Within the Executive Branch, the President would have ultimate enforcement responsibility. At the same time, the agreements may be viewed as tantamount to an admission or a determination by the Executive as to the requirements of the statute and as such will often be virtually dispositive of a claim in a citizen judicial enforcement action that deviation from the statement constitutes a statutory violation. So long as the statutory requirements have been properly articulated within the Executive Branch process and remain effective, the citizen may sue and may invoke the "Executive Compliance Agreement" or "Executive Compliance Order" to enforce compliance with the statute. While it is well established in constitutional jurisprudence that executive agreements are not in and of themselves enforceable,[4] this is not a practical problem here, however, as the citizen is suing to enforce the requirements of the statute and not the executive agreement per se -- the ultimate enforcement of which constitutionally resides with the President. For these reasons, the Department of Justice believes that the process established by this Memorandum of Understanding is fully consistent with both RCRA and the constitutional principles just discussed, yet produces a document that demonstrates Executive accountability.

---

[4] *See* *In re Surface Mining Regulation Litigation*, 627 F.2d 1346, 1357 (D.C. Cir. 1980); *Independent Meat Packers Ass'n v. Butz*, 526 F.2d 228, 236 n.21 (8th Cir. 1975), *cert. denied*, 424 U.S. 966 (1976); *Weise v. Syracuse University*, 522 F.2d 397, 411 n.23 (2d Cir. 1975); *Acevedo v. Nassau County*, 500 F.2d 1078, 1084 & n.7 (2d Cir. 1974); *Stevens v. Carey*, 483 F.2d 188, 190 (7th Cir. 1983); *Kuhl v. Hampton*, 451 F.2d 340, 342 (8th Cir. 1971); *Place v. Weinberger*, 497 F.2d 412, 415 (6th Cir. 1974); *Gnotta v. United States*, 415 F.2d 1271, 1275 (8th Cir. 1969), *cert. denied*, 397 U.S. 934 (1970); *Manhattan-Bronx Postal Union v. Gronowski*, 350 F.2d 451, 456 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); *Farkas v. Texas Instrument, Inc.*, 375 F.2d 629, 632-33 (5th Cir.), *cert. denied*, 389 U.S. 977 (1967); *Farmer v. Philadelphia Electric Co.*, 329 F.2d 3, 8-10 (3rd Cir. 1964).

Let me assure you that this resolution of the constitutional difficulties presented by unilateral order authority in no way limits the effect of the statute's requirements on federal agencies. Those agencies are required by the statute to comply with stringent requirements and standards. The heads of the agencies, as well as the President, are obligated to see that such agencies faithfully comply with the requirements. But when there is legitimate dispute as to the meaning or application of such requirements, the ultimate responsibility for resolution lies with the President.

You have also asked specifically about the role of the Justice Department in the development of Executive Order 12580, implementing the Superfund Amendments and Reauthorization Act. In particular, you asked about section 4(e) of that Executive Order. The Executive Order was developed through the efforts of all interested units in the Executive Branch, under the coordination of the President's OMB. Accordingly, the Justice Department participated in that effort, including commenting on various drafts of, and attending meetings about, the Executive Order.

SARA creates new remedies, including citizen suits. In order to assure that the President can manage the government and resolve disputes within the Executive Branch before such conflicts might be presented to the judiciary for resolution, Section 4(e) of the Executive Order provides for consultation with the Justice Department in the event EPA believes an "order" should be issued to a federal facility. This provision of the Executive Order is certainly not designed to obstruct federal facility compliance with CERCLA, but rather to assist it. It has been our experience that in most instances, differences between federal agencies regarding environmental compliance have not been over the technical steps necessary to remedy a problem. Rather, disagreements usually involve legal or policy matters, which are appropriately resolved at a policy level within the government. By providing for consultation with the Justice Department, the President's Executive Order is intended to facilitate rapid isolation and resolution of such issues, so that they do not result in delayed compliance by the federal government. Let me emphasize this point again: The Justice Department will not delay the necessary clean up action because of some policy or legal disagreement that is not central to the action -- whether it is §3008(a) order authority or the availability of civil penalties under §6001.

Your letter expressed concern that this was an unwarranted change from Executive Order 12316, implementing CERCLA. It is our understanding that in the past EPA has routinely sent PRP letters and other notices to federal agencies, but has never sent orders under Section 106 of CERCLA. Where federal agencies have received notices from EPA, they have often, on an ad hoc basis, consulted with this Department or other units of the Executive Branch to ascertain how certain legal or policy matters are handled. Section 4(e) of Executive Order 12580 simply makes clear that such consultation should be a normal part of this process, rather than haphazard.

Finally, you also asked specifically about the Department of Energy and Department of Defense contractual provisions concerning indemnity of contractors at government owned facilities. Let me say frankly that these aspects of government practice are not of direct concern to my priorities in enforcing the environmental laws. As I stated, we have filed several actions against government contractors. When a federal agency is sued, or the contractor of any agency is sued, the contractual and/or indemnity relationship is not a major factor in assessing the environmental case. The prime concern is whether there is a violation and how it can be remedied. For this reason, I have not had the occasion to consider in detail government contracting practices, including how such practices generally might be related to indemnity for noncompliance with environmental laws.

In conclusion, federal agencies have gone a long way toward achieving compliance with environmental requirements -- we still have a distance to go to achieve full compliance and there exist many vehicles for ensuring results. We are now in a position to move forward with EPA regulations, permits and compliance agreements. Moreover, as we informed the Subcommittee in our October 11, 1983 letter, the Justice Department stands ready to utilize the full panoply of its judicial enforcement tools against GOCO-violators that are operating on federal facilities. At the same time, I fully expect that State and citizen enforcement will continue to be active in this area. Finally, the proposed MOU will provide an open process that enhances agency accountability to the public and to the Congress. As I noted earlier, Congress has also set in motion, through the amendments to CERCLA, and through the appropriation of funds, a process to ensure that cleanup activities continue. A continued working relationship with members of Congress and a common understanding of mission and budget issues is essential, for without it, the agencies will be unable to achieve results.

We all share the same goals -- quick and effective federal facility compliance -- the only question is the best means to reach them. Many federal agencies that are subject to RCRA or CERCLA are already coordinating their compliance with EPA to avoid the need for administrative orders. To this end, EPA has been negotiating compliance agreements with other federal agencies covering response actions at federal facilities. I firmly believe the new MOU that this Department has developed, in coordination with EPA, will further facilitate the process of dispute resolution between EPA and other executive agencies under RCRA, without doing violence to our constitutional structure. The proposed MOU would establish procedures quickly to resolve disputes at the agency level and that would include a generous opportunity for public comment. The key goal is to achieve results, and if these negotiated compliance commitments can go forward at each major facility, those results will surely come.

The Department of Justice looks forward to working closely with Members of this Subcommittee and the various federal agencies in this most important area. I would be pleased to answer any questions you might have.

APPENDIX "A" -- Answer to Question 4.

Civil judicial EPA enforcement cases are referred to the Lands Division with litigation reports prepared by the EPA Regional Office. Incoming referrals are received in the Environmental Enforcement Section (EES) and routed to an Assistant Section Chief who, in turn, assigns the matter to a trial attorney to handle.

The trial attorney performs the basic case evaluation to analyze factual and legal issues. (In some cases, an Assistant U.S. Attorney may be the lead DOJ lawyer, so the Lands trial attorney will work jointly with the Assistant U.S. Attorney to conduct the case evaluation.) If additional information is needed to determine whether to file the case, the trial attorney, with the approval of an Assistant Chief or Senior Lawyer, makes a supplementary request to the EPA attorney assigned to the case. If supplemental information is not timely provided by EPA to the Division, then the case may be returned to EPA until further necessary information is available. Referrals returned for this reason must be approved in writing, by the Chief of the Section.

When sufficient information has been obtained to evaluate the EPA referral on the merits, a decision is made whether or not to file the case, unless EPA has decided to withdraw the matter. If EES staff recommend filing the case, then the EES trial attorney prepares a draft complaint which is reviewed by EPA staff. The draft complaint is directed to me, as the Assistant Attorney General, under cover of a memorandum analyzing the case. This package is reviewed by the trial attorney's Assistant Chief, the EES Section Chief or Deputy Chief, and the Deputy Assistant Attorney General before it reaches my desk. The Assistant Attorney General signs both the cover memorandum and the complaint. The complaint is then forwarded to the U.S. Attorney's Office, where it is signed by an Assistant United States Attorney prior to filing.

If EES staff believes the case should not be brought, the Chief of the Enforcement Section, writes to the Senior Enforcement Counsel, OECM, (EPA) and the relevant EPA Regional Counsel explaining, in detail, the reasons supporting this decision. This letter is reviewed by the Deputy Assistant Attorney General before it is sent. If EPA staff disagree with the EES declination, they may request that the matter be reviewed by me or the Deputy Assistant Attorney General, Lands Division. Over the last 5 years the Division has declined to file fewer than 3% of the cases referred by EPA, in part because of effective communication throughout the process.

Where the EPA litigation report or the evaluation by the Division suggests that a potential counterclaim may be filed by the proposed defendant(s) against the United States, including those by a government contractor against the United States, the EES may request assistance in analyzing the risks posed by such potential counterclaims from the Environmental Defense Section

(EDS). Requests for such assistance by EES to EDS are made through a supervisor in EES (Chief/Deputy Chief or Assistant Chief) to the Chief or Assistant Chief, EDS. Environmental Defense Section lawyers are responsible for defending the United States on counterclaims brought by defendants in civil enforcement cases and report to a different Deputy Assistant Attorney General from the one who supervises enforcement. Accordingly, these assistance requests allow EDS staff to obtain factual information from non-EPA client agencies regarding the potential counterclaim, to advise EES staff on the merits of the potential counterclaim, and to prepare responses to counterclaims where necessary. EDS staff ordinarily will obtain necessary factual information from the relevant client agency and communicate that to the EES staff, who in turn, arranges for review of this information by EPA staff working on the case. Assessing counterclaims is an essential part of evaluating the overall merits and exposure of the United States' affirmative claims. However, let me emphasize that the risk, or presence, of a counterclaim generally does not affect filing of an enforcement case.

If there are concerns between EES and EDS staff involving a case where there is a counterclaim risk, the Chiefs of the respective sections attempt to resolve the matter informally. Continued concerns are elevated to the Deputy Assistant Attorneys General who supervise the two sections, and then to me, if necessary.

The EES trial attorney (or an Assistant United States Attorney under EES supervision in some cases) prosecutes the complaint after filing to final resolution by settlement or final judgment. If the defendant files a claim back against the United States, by way of answer or other responsive pleading, the EES will forward those matters to the EDS for primary handling. If the claims are based on matters within the jurisdiction of other sections in the Lands Division or other Divisions of DOJ, EDS will refer the matters to the relevant offices for assistance. EPA is advised by the EES or EDS staff of any such referral.

APPENDIX B, in partial.answer to Question 1.

The Department has approached the Subcommittee's quesiton conerning RCRA compliance order authority against federal facilities by utilizing the same analysis applied to any question concerning the scope of a statutory waiver of sovereign immunity. This analysis must begin with Section 3008(a). That section provides, in pertinent part, as follows:

> [W]henever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both, ...

42 U.S.C. 6928(a)(1) (emphasis added). By its terms, section 3008(a) applies only to "persons" found to have violated a requirement. In turn, section 1004 of RCRA contains definitions applicable throughout the chapter, and provides that

> The term "person" means any individual, trust, firm, joint stock company, corporation (including a government corporation), a partnership, association, State, municipality, commission, political subdivision of a State, or any interstate body.

42 U.S.C. 6903(15). Federal agencies are not included in this definition. This very strongly suggests that federal agencies are not "persons" under RCRA. Further support for this interpretation is found in the fact that not only does the definition of "person" make no mention of federal agencies, but also section 1004(4) contains a distinct definition of "federal

agency," as that term is used in the chapter. That section 1004 contains independent definitions of both "person" and "federal agency" indicates clearly that the omission of the latter from the former was not inadvertent.

Given that federal agencies and departments are not defined as "persons" for purposes of RCRA, it would be reasonable to inquire as to the source of the obligation of federal facilities to comply with RCRA's requirements, including the requirement to obtain permits. That obligation is derived exclusively from RCRA section 6001. That section, entitled "Application of Federal, State, and local law to Federal Facilities," provides as follows:

> Each department, agency, and instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any solid waste management facility or disposal site, or (2) engaged in any activity resulting, or which may result, in the disposal or management of solid waste or hazardous waste shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief), respecting control and abatement of solid wastes or hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges. Neither the United States, nor any agent, employee, or officer thereof, shall be immune or exempt from any process or sanction of any State or Federal Court with respect to the enforcement of any such injunctive relief.

42 U.S.C. 6961. It is noteworthy that section 6001, on its face, draws a very explicit distinction between "federal agencies" and "persons," stating that federal agencies "shall be subject to, and comply with, all Federal, State, interstate, and local

requirements, both substantive and procedural . . . in the same manner, and to the same extent, as any person." Id. (emphasis added).

In light of the language of section 6001, the question of EPA's statutory authority to issue a specific compliance order to other federal agencies, then, turns not on whether a federal agency is a person under section 3008 -- because clearly, it is not -- but rather on whether section 6001 subjects federal agencies to the compliance order authority of the EPA in the particular circumstance in question. The answer to this question, in turn, depends on whether the compliance order under consideration constitutes a substantive or procedural requirement within the meaning of section 6001. There is much in the legislative history and the relevant case law that suggests that 3008(a) compliance orders themselves are not "requirements" of RCRA.

In June 1976, the Supreme Court held that section 313 of the Federal Water Pollution Control Act Amendments of 1972 ("Water Pollution Amendments") did not obligate federal agencies to obtain state permits, but required only that "federal installations . . . comply with applicable state requirements." EPA v. California ex rel. State Water Resources Control Board, 426 U.S. 200, 212 (1976). Section 313 then provided as follows:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal Government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants shall comply with Federal, State, interstate, and local

> requirements respecting control and abatement of pollution to the same extent that any person is subject to such requirements, including the payment of reasonable service charges.

86 Stat. 875, 33 U.S.C. 1323 (1970 ed. Supp. IV). You will note that, with the omission of one clause, this language is identical to that found in RCRA section 6001. Thus, in the context of the waiver of sovereign immunity found in an environmental statute, the Supreme Court drew a distinction between permits and the underlying statutory "requirements." The Court ended its opinion by stating that if Congress desires federal installations to be subject to state permit requirements, "it may legislate to make that intention manifest." 42 U.S. at 227-28.

Within a month of this decision, the Senate Committee on Public Works reported its version of the bill that was enacted ultimately as RCRA. S. 3622, 94th Cong., 2d Sess. (1976). The section of the bill that became section 6001 of RCRA was patterned after section 313 of the Water Pollution Amendments, with one significant addition. Whereas section 313 merely obligated federal installations to comply with "Federal, State, interstate, and local requirements," the bill then under consideration would have subjected such installations to "all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirements for permits and reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief)." While the committee report did not reference the Supreme Court's recent decision pertaining to the Water Pollution Amendments, it seems plain that the change was an attempt by Congress to make "manifest" its intent to subject federal agencies to requirements, such as those for permits, that the Supreme Court had so recently held inapplicable under the parallel provision of the Water Pollution Amendments. The Senate bill, however, was silent as to the availability of enforcement measures such as compliance orders and civil penalties.

Meanwhile, in the House, the Committee on Interstate and Foreign Commerce drafted a bill that would have expressly subjected federal agencies to administrative enforcement mechanisms and civil penalties. H.R. 14496, 94th Cong., 2d Sess. (1976). Section 601(b) of the House bill provided that federal agencies were subject to "all Federal Requirements under title III and for purposes of such title (including actions taken by the Administrator under sections 307 and 308) the term 'person' includes any department, agency, or instrumentality of the United States." Section 308 of the House bill -- authorizing EPA to issue compliance orders to any "person" in violation of hazardous waste requirements, to impose civil penalties, and to commence civil actions in court against such persons -- was virtually identical to the provision enacted as RCRA section 3008(a).

Desiring to avoid the necessity of a conference to resolve differences between the House and Senate bills, the House, by a voice vote, agreed to strike the entire text of its bill and substitute a compromise closer to the bill passed by the Senate. 122 Cong. Rec. 32832 (1976). The House substitute, it should be noted, now contained RCRA section 6001 as finally enacted, thus including no provision purporting to subject federal agencies to EPA compliance order authority or civil penalties. Three days later, the Senate, by a voice vote, passed the House substitute without amendment. 122 Cong. Rec. 33818 (1976). That Congress considered, but failed to enact, a bill that expressly would have granted EPA the precise authority now contended for under RCRA supports the conclusion that EPA lacks statutory authority to issue compliance orders generally to other federal agencies.

Judicial decisions under RCRA section 6001 provide additional support for this construction of the statute. In California v. Walters, 751 F.2d 977 (9th Cir. 1984), California sought to recover criminal penalties against the Veterans Administration for disposing of hazardous waste in violation of state requirements. The only question presented was whether the VA was subject to such penalties under RCRA section 6001. California contended that its criminal penalties for violation of state disposal requirements constitute a substantive or procedural requirement with which the VA must comply under section 6001. The United States Court of Appeals for the Ninth Circuit, the only Circuit which has considered the meaning of RCRA section 6001, squarely rejected this claim. According to the court:

> State waste disposal standards, permits, and reporting duties clearly are "requirements" for the purpose of [section 6001]. Criminal sanctions, however, are not a "requirement"

> of the state law within the meaning of [section 6001], but rather the means by which the standards, permits, and reporting duties are enforced. Section [6001] plainly waives immunity to sanctions imposed to enforce injunctive relief, but this only makes more conspicuous its failure to waive immunity to criminal sanctions.

Id. at 978; accord Meyer v. Coast Guard, 24 E.R.C. 2013, 2014 (E.D. N.C. 1986) (RCRA section 6001 does not subject Coast Guard to civil penalties recoverable by the state for violations of state requirements because such penalties "appear to be a means by which requirements are enforced and not requirements themselves"); Florida Department of Environmental Regulation v. Silvex Corp., 606 F. Supp. 159 (M.D. Fla. 1985) (state statute imposing strict liability for negligent release of hazardous waste material does not constitute a "requirement" under RCRA section 6001). The reasoning of the Walters opinion is instructive. Like state criminal penalties, a compliance order can be more readily viewed as a "means by which . . . standards, permits, and reporting duties are enforced," rather than an independent, substantive requirement.

One additional district court decision under RCRA section 6001 is directly relevant to the discussion. In McClellan Ecological Seepage Situation v. Weinberger, 25 E.R.C. 1480 (E.D. Calif. 1986), a citizens group brought suit against the Defense Department for alleged violations of RCRA, seeking injunctive and declaratory relief as well as civil penalties under RCRA section 7002, the citizen suit provision. We moved to dismiss the claim for civil penalties on the ground that the statute did not subject the United States to such penalties. Section 7002 permits citizens to commence civil actions against "any person (including . . . the United States . . .)" and authorizes the district court to order appropriate injunctive relief "and to apply any appropriate civil penalties under [RCRA section 3008(a) and (g)]." The court first concluded that section 3008 applies only to "persons," and that "person," as defined by RCRA section 1004(15), does not include the United States. The Court thus looked to RCRA section 6001 to determine whether the United States had been subjected to section 3008's civil penalty provisions. As stated by the court:

> The plain face, common-sense reading of [section 6001] convinces this Court that there has not been a waiver of sovereign immunity regarding the imposition of civil penalties against federal facilities under RCRA. The plain face reading of this legislation demonstrates that Congress intended to waive sovereign immunity on behalf of the United States, insofar as process or sanctions is concerned, only as required for enforcement of injunctive relief.

Id. at 1481. Accordingly, the court granted the motion to dismiss.

Taken together, these decisions illustrate the courts' continued application of the time-honored rule that waivers of sovereign immunity must be narrowly construed. See, e.g., California v. Walters, 751 F.2d 977, 978 (1984) (citing United States v. Mitchell, 445 U.S. 535, 538 (1980)); Hancock v. Train, 426 U.S. 167, 179 (1976). In the specific context of section 6001, this rule of construction suggests that the obligation of all federal agencies is to comply with all federal, state, and local hazardous and solid waste disposal requirements, including permit and reporting requirements, but that the means of enforcing compliance with such requirements is through state, local, or citizen-initiated actions for injunctive relief. Under this interpretation, administrative compliance orders -- like criminal and civil penalties -- are not "requirements" and hence, are not within the waiver of sovereign immunity. This argument draws its strength from the self-evident proposition that compliance orders issued by the EPA under Section 3008(a) are most appropriately considered a means of enforcing RCRA requirements, rather than as "requirements" themselves under section 6001. This is especially clear when it is recalled that section 3008(a) not only authorizes compliance orders to assess civil penalties, but also subjects the person to whom they are issued to independent civil penalties upon failure to comply with such orders. As discussed, several courts have determined that Congress did not intend the United States to be liable for civil penalties under the statute. Moreover, while section 3008 provides that compliance orders may include a "revocation of any permit," such revocation is independently authorized by RCRA section 3005(d), and certainly falls within section 6001's command that federal agencies comply with "requirements for permits."

Although we realize that RCRA section 6001 is not without ambiguity, the Department believes that the construction of the statute outlined above is compelled from the statutory language, legislative history, and relevant judicial decisions. Of course, in the event that RCRA.were amended to remove any ambiguity concerning EPA order authority generally vis-a-vis other federal agencies, the Constitution would continue to restrain EPA's unilateral use of "orders" that might trigger citizen suit enforcement. Accordingly, these "orders" would still have to be the result of an Executive Branch process that preserved the President's constitutional prerogatives.

APPENDIX I

ENFORCEMENT RESPONSE AUTHORITIES BY PROGRAM

APPENDIX I

ENFORCEMENT RESPONSE AUTHORITIES UNDER MAJOR ENVIRONMENTAL STATUTES

This exhibit defines terms commonly used for EPA enforcement actions under each of the major environmental statutes. However, not all of these authorities and actions can be utilized for Federal facilities. It is important to clarify that: (1) administrative enforcement authorities apply to Federal facilities except as noted; (2) administrative penalty order authorities and civil judicial authorities will not apply to enforcement against Executive Branch agencies but are included only for information purposes as they may apply to some Federal facilities, e.g., to non-Executive Branch agencies or to contractors at GOCOs; and (3) criminal authorities are included because these can be used against individual employees of any Federal facility or private parties.

ADMINISTRATIVE ENFORCEMENT AUTHORITIES

Administrative enforcement authorities (those taken by an agency without court action) include notices of violation; notices of noncompliance; administrative orders; bilateral compliance agreements; and contractor listing proceedings. Noted with (*) are administrative penalty order authorities which are subject to EPA's Consolidated Rules of Practices. For these authorities, a formal administrative procedure is used beginning with either an initial proposed order or an administrative complaint which is the initial notice received by a source. Following receipt of the initial order or complaint, the violator formally answers, and a final order may be issued with the consent of the Agency or become final and effective if no response is forthcoming. There is usually an opportunity for a formal hearing before an Administrative Law Judge or presiding officer and subsequent appeal before the Administrator. Administrative penalty authorities are not used for enforcement actions against Executive Branch agencies but may be used against contractors at Government Owned Contractor Operated (GOCO) facilities.

CIVIL JUDICIAL ENFORCEMENT AUTHORITIES

As noted above, these authorities are only employed in enforcement actions which are not directed against Federal Executive Agencies. They are "judicial" in that they are brought in and enforced by the courts, as opposed to administrative action brought by the agency by statutory or regulatory authority without judicial enforcement. Civil judicial actions should be distinguished from criminal judicial actions. While both civil and criminal judicial actions may involve the imposition of monetary penalties, no imprisonment or criminal record results from the imposition of a civil judgment.

CRIMINAL JUDICIAL AUTHORITIES

Like civil actions, criminal judicial actions are formal legal actions brought in a court of law. The principle differences, as noted above, are: civil court actions may result in the losing party being ordered to pay monetary damages to the prevailing party, being ordered to pay a monetary ("punitive") penalty, or being subject to injunction (a court order to do or stop doing something), while criminal actions may result in a conviction (i.e., a criminal record) in addition to a fine and/or time spent in prison.

I. HAZARDOUS WASTE

*** RESOURCE CONSERVATION AND RECOVERY ACT (RCRA) ***

A. ADMINISTRATIVE NOTIFICATION ACTIONS (These are formal notifications advising recipients of violations detected and/or actions required to be taken. These notifications generally may be issued to all Federal facilities.)

Warning Letters may be issued to advise a recipient of noncompliance. Although the letters are not specifically authorized by the statute, EPA has the option of issuing warning letters when it deems appropriate. Warning letters contain a deadline for achieving compliance with the relevant portion of the Act. These are used only for minor violations.

Notice of Violation (NOV) is a formal notification of a violation discovery which explains the violation and the necessary action required by the facility. Note that NOV's are not appropriate for high priority Class I violations.

Administrative Complaint is the initial order and notice of violation. It is issued prior to a final administrative order for authorities subject to the EPA Consolidated Rules of Practice. It pertains to all RCRA authorities identified with an * below and is the only acceptable first notice for high priority Class I violations. The purpose of the administrative complaint is to provide the respondent the opportunity to confer with EPA before a final order is issued.

Notice of Noncompliance(NON) is used for Federal facilities in lieu of Adminstrative Complaints but essentially serve the same purposes.

B. ADMINISTRATIVE ENFORCEMENT ACTIONS (Administrative Orders are generally issued by EPA to Federal facilities on consent only. However, if a Federal facility fails to respond to a proposed order within a specified time period (usually 30 days), the order becomes final and effective. Where EPA does not have statutory administrative order authority for Federal facilities, Compliance Agreements are used.)

* Section 3008 (a): For any violation of Subtitle C (Hazardous Waste) of RCRA. They will not be used for enforcement against Executive Branch agencies; instead, NOV's and compliance agreements will be used.

Federal Facility Compliance Agreements are generally used in the RCRA program for § 3008 (a) enforcement actions.

* Section 3008 (g): For penalties of up to $25,000/day for violation of Subtitle C. They will not be used for enforcement against Executive Branch agencies.

Section 3008 (h): For undertaking corrective action at a facility. Administrative Orders will only be issued for § 3008 (h) on consent.

Section 3013: For requiring monitoring, testing, analysis or reporting relating to the presence of hazardous waste at a facility.

Section 7003: For eliminating an "imminent and substantial endangerment."

Section 9006: For violations of underground storage tank requirements.

C. CIVIL JUDICIAL ACTIONS: (EPA may not use these authorities for Federal facilities, although they can be exercised against contractors at GOCO facilities.)

Section 3008 (a): Injunctive relief for violation of a provision of Subtitle C.

Section 3008 (g): Authority for civil judicial penalties for violations.

Section 3008 (h): Authority to seek injunctive relief to undertake corrective actions.

Section 3013 (e): For noncompliance with the §3013 administrative order and the judicial assessment of a maximum fine of $5,000/day for noncompliance with the order.

Section 7002: Allows for citizen suits against Federal facilities (including GOCO's) for violations of permits, standard, regulations, conditions requirements, prohibitions, orders or compliance agreements under RCRA.

Section 7003: For injunctive relief to eliminate an "imminent and substantial endangerment" and the judicial assessment of a maximum fine of $5,000/day for noncompliance with or violation of a § 7003 administrative order.

Section 9006 (a), (d): Injunctive relief and civil penalties for violations of underground storage tank requirements.

D. CRIMINAL JUDICIAL ACTIONS: (These may be exercised against individual employees of Federal agencies as well as private parties.)

Section 3008 (d) and (e): Impose criminal penalties for the knowing transportation of any hazardous waste to an unpermitted facility, the knowing violation of permit provisions, and the knowing treatment, storage or disposal of a hazardous waste without a permit. Separate criminal penalties are provided for "knowingly endangering" another person as a result of the foregoing violations. The criminal penalties are up to $50,000/day and two years in prison.

*** COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION AND LIABILITY ACT ***

(Although this strategy does not apply to CERCLA/SARA enforcement the following was been included for information purposes only.)

A. ADMINISTRATIVE NOTIFICATION ACTIONS (These are formal notifications advising recipients of violations detected and/or actions required to be taken. These notifications generally may be issued to all Federal facilities.)

Notice Letters are issued to potentially responsible parties informing them of the releases of hazardous substances at a site and their potential liability for undertaking remedial action or payment for the costs of remedial action. Notice letters, which are not specifically authorized by CERCLA, encourage potentially responsible parties to meet with EPA personnel to discuss actions needed to respond to the site.

B. ADMINISTRATIVE ENFORCEMENT ACTIONS (Administrative orders are generally issued by EPA to Federal facilities on consent only. However, if a Federal facility fails to respond to a proposed order within a specified time period (usually 30 days), the order becomes final and effective. Where EPA does not have statutory administrative authority for Federal facilities, Compliance Agreements are used.)

Section 106 (a): Authorizes issuance of an administrative order requiring the recipient to take response action when a release represents an "imminent and substantial endangerment." A maximum fine of $25,000/day (increased from $5,000/day by SARA) may be assessed pursuant to a U.S. district court order for noncompliance with the administrative order. Executive Order (E.O.) 12580 requires that EPA obtain concurrence from the Department of Justice prior to issuance of § 106 orders.

Interagency Agreement (IAG) : An IAG is the method required by § 120(e)(2) for the expeditious completion of remedial actions at Federal facilities. Section 120(f) allows State and local officials to participate in the planning and selection of the remedial actions. The IAG itself is only required to be signed by the EPA Administrator and the head of the Federal agency or department involved. States, however, may also be signatories to IAG, where mutual agreement can be reached between the parties in a timely manner.

C. CIVIL JUDICIAL ACTIONS (EPA may not use these authorities for Federal facilites, although they can be exercised against contractors at GOCO facilities.)

Section 106(a): Injunctive relief to secure abatement of a hazard that represents an "imminent and substantial endangerment."

Section 106(b)(1): In addition to the injunctive relief afforded by § 106(a), this section authorizes the appropriate U.S. district court to impose fines of up to $25,000/day for non-compliance with its injunctive order.

Section 310 (added by SARA) also allows for citizens suits against Federal facilities for alleged violations of any standards, regulations, conditions, requirements or orders effective pursuant to CERCLA/SARA. This section also allows for citizen suits for alleged violations of any IAG's entered into under § 120. Under this section, Federal district courts have injunctive and fine authority as authorized in § 109 of SARA.

Section 107 (c)(3): Authorizes civil action (for noncompliance with removal or remedial action orders issued pursuant to § 104 or 106) and punitive damages up to three times the amount of any costs of response incurred by the fund.

D. CRIMINAL JUDICIAL ACTIONS (These may be exercised against individual employees of Federal agencies as well as private parties.)

Section 103 (b): SARA technically amended this Section to include fines "in accordance with the applicable provisions of Title 18 of the United States Code" or 3 years imprisonment, or both (5 years for second or subsequent convictions).

II. AIR

*** CLEAN AIR ACT ***

A. ADMINISTRATIVE NOTIFICATION ACTIONS (These are formal notifications advising recipients of violations detected and/or actions required to be taken. These notifications generally may be issued to all Federal facilities.)

Stationary Sources

Section 114: Authorizes agency to seek information from a source regarding its compliance status, e.g., records and results of emission testing. This information can then be used to decide whether formal administrative or judicial enforcement action is warranted.

Section 113 (a): Notice of Violation calls for compliance with the State Implementation Plan (SIP) within 30 days. (NOV is not required for NESHAPS/NSPS violations.) The NOV serves an important purpose in the enforcement process in that it is a procedural requirement for issuing a §113(a) compliance order for SIP violations (see below). The issuance of the NOV serves as the starting point for determining when a SIP violation "has continued beyond the 30th day." Section 113(a)(1) requires that a State be notified. In some cases, a State/EPA Memorandum of Agreement may require State notification prior to issuing the NOV.

B. ADMINISTRATIVE ENFORCEMENT ACTIONS (Administrative orders are generally issued by EPA to Federal facilities on consent only. However, if a Federal facility fails to respond to a proposed order within a specified time period (usually 30 days), the order becomes final and effective. Where EPA does not have statutory administrative order authority for Federal facilities, Compliance Agreements are used.)

Section 113 (a): Immediate Compliance Orders can be issued for SIP violations which continue beyond 30 days, as well as for NSPS and NESHAPS violations. They can also be issued for an immediate ban on construction or modification of a major stationary source in a nonattainment area, and for inspections, monitoring, and entry requirement violations. Administrative Compliance Orders can also be issued for New Sources, Municipalities violating secondary treatment requirements, and for administratively extended permits. A unilateral order that is not complied with is enforced via a civil action.

Section 113(d): Delayed Compliance Orders may be used to provide limited extensions from air pollution control deadlines. However, only an extension of the legally applicable compliance date is permitted by the order.

Section 303 "Emergency Power" Orders: May be used in situations representing an "imminent and substantial danger." Failure to

248

comply with this order carries a maximum penalty of $5,000/day.

Section 120: Authorizes assessment of noncompliance penalties for violation of emission requirements which may be sought in addition to any injunctive relief sought under § 113. These penalties recapture the economic benefit of noncompliance and they will not be used for enforcement against Executive Branch Agencies.

Compliance Agreements: Used for enforcement against Executive Branch Agencies which, when signed by both parties, indicate agreement on actions and schedules that are needed to reach compliance.

C. CIVIL JUDICIAL ACTIONS (EPA may not use these authorities for Federal facilities, although they can be exercised against contractors at GOCO facilities.)

Stationary Sources

Section 113 (b): Authorizes civil judicial action for violation of NSPS or NESHAPS requirements and for SIP violations which continue beyond 30 days as well as a cause of action for civil penalties of up to $25,000/day for violations of the Act.

Section 113 (b): Authorizes civil action for the recovery of a noncompliance penalty assessed under § 120.

Mobile Sources

Section 204(a): Gives U.S. district courts jurisdiction to restrain violations of § 203(a) through injunction.

Section 205: Provides penalties for violating § 203(a) up to $10,000.

D. CRIMINAL JUDICIAL ACTIONS (These may be exercised against individual employees of Federal agencies as well as private parties.)

Stationary Sources

Section 113 (c): Provides penalties for knowing violations of SIP, NSPS and NESHAPS and for knowing violation of a compliance order. Criminal penalties can also be assessed for knowingly making false statements or representations in required documents and for tampering with required monitoring equipment. Violations of SIP and NESHAP requirements provide a penalty of up to $25,000 and one year in prison.

III. WATER

*** CLEAN WATER ACT ***
(As Amended by the "Water Quality Act of 1987")

A. ADMINISTRATIVE NOTIFICATION ACTIONS (These are formal notifications advising recipients of violations detected and/or actions required to be taken. These notifications generally may be issued to all Federal facilities.)

Section 308: To compliment formal enforcement actions (e.g., to develop limitations/ standards or to determine whether there is a violation of CWA standards), this Section requires the EPA Administrator to require owners or operators of any point source to establish and maintain records and/or reports, to install and use sampling/monitoring equipment, and to provide other information. This Section does not require a formal order, but merely the Administrator's directed requirement (such as in a letter). This Section also authorizes the Administrator to enter premises where effluent sources or records are located.

Section 309 (a): Authorizes the use of a Notice of Violation sent by EPA to both the authorized States and the violator stating that a violation has been detected; the State may then take the enforcement action. NOV's usually encourage the violator to rectify the problem or clarify the legal obligations under the Act.

B. ADMINISTRATIVE ENFORCEMENT ACTIONS (Administrative orders are generally issued by EPA to Federal facilities on consent only. However, if a Federal facility fails to respond to a proposed order within a specified time period (usually 30 days), the order becomes final and effective. Where EPA does not have statutory administrative order authority for Federal facilities, Compliance Agreements are used.)

Section 309 (a) (1) and (a) (3): Issued for violations of numerous CWA provisions including:

-- effluent limitations and unauthorized discharges (§301)
-- water quality-related effluent limitations (§302)
-- new source performance standards (§ 306)
-- toxic and pretreatment effluent standards (§307)
-- information requests and inspections (§308)
-- aquaculture (§318)
-- sewage and sludge disposal (§405)
-- permit violations (pursuant to §402 and §404)

Notice of Deficiency can be issued to owners or operators who have failed to submit complete NPDES applications or to address sampling and laboratory analysis deficiencies and can be followed by an administrative order for serious violations.

Section 309 (a) (5) (A): Under certain circumstances, an Order may be issued by EPA which specifies a time for compliance beyond the initial 30-day limit. This administrative order is applicable to permittees who have violated final deadlines, but not interim deadlines. An administrative order may not be used to extend final deadlines beyond the statutory requirements but may be used to set interim deadlines. It is not applicable to permittees who have violated Operations and Maintenance (O&M) requirements.

Section 309(g): (Added by § 314 of the 1987 Amendments) Authorizes administrative civil penalties for violations of selected sections of the Act, for violations of NPDES permit conditions, and for unpermitted § 404 violations (including State-issued § 404 permits). The penalties are divided into 2 classes depending upon several factors detailed in § 309 (g)(3): Class I - not to exceed $10,000 per violations; $25,000 maximum. Class II - not to exceed $10,000 per day; $125,000 maximum. They will not be used for enforcement against Executive Branch agencies.

Section 508 and EPA's implementing regulations authorize EPA to establish a suspension and debarment program -- the Contractor Listing Program. Section 508(a) prohibits any Executive Branch Agency from entering into a contract with any person who is convicted of a criminal violation under 309(c) of the CWA for the procurement of goods, materials, or services, if such a contract would be performed at any facility at which the criminal violation occurred. If a contractor who operates a government facility is convicted under § 309(c) for violations of CWA standards at the government facility, the facility will be placed on the List of Violating Facilities and the contract with the operator may not be renewed until the Administrator certifies that the condition which gave rise to the conviction has been corrected.

Compliance Agreements: Are the primary enforcement mechanisms for enforcement against Executive Branch Agencies which are signed by both parties to indicate agreement on actions and schedules that are needed to reach compliance.

C. CIVIL JUDICIAL ACTIONS (EPA may not use these authorities for Federal facilities although they can be exercised against contractors at GOCO facilities.)

Section 309 (b): Authorizes civil judicial actions for appropriate relief, including temporary or permanent injunctions, for any violation for which an administrative compliance order may be assessed i.e., §§ 301, 302, 307, 308, 318, 405 or for violations of conditions or limitations in a § 402 or 405 permit.

Section 309 (d): Authorizes a civil penalty of up to $25,000/ day for each violation of the Act.

D. CRIMINAL JUDICIAL ACTIONS (These may be exercised against individual employees of Federal facilities as well as private parties.)

Section 309 (c): The Act now provides specific penalties for certain negligent or knowing violations, for knowing endangerment of death or serious injury and for false statements. Minimum penalties range from a low of $2500/ day for negligent violations to a maximum of $100,000/ day for knowing violations and from a minimum of not more than one year in prison for negligent violations and 6 year for knowing violations. A conviction for one who knowingly endangers life by violating the Act can result in as much as a $250,000 fine and 15 years imprisonment, or both for a first conviction. The penalties and jail sentences will be double for any subsequent conviction; a corporation found guilty of knowing endangerment is subject to a $1,000,000 fine.

*** THE SAFE DRINKING WATER ACT (SDWA) ***

SDWA establishes two major programs: Public Water Supply Systems (PWSS) and Underground Injection Control Programs (UIC). Since many provisions are program specific it is useful to distinguish the authorities.

A. ADMINISTRATIVE NOTIFICATION ACTIONS (These are formal notifications advising recipients of violations detected and/or actions required to be taken. These notifications generally may be issued to all Federal facilities.)

Public Water Supply Systems (PWSS)

Notification of Violation: (EPA's final Public Notice Rules were published on October 28, 1987 and become effective on April 26, 1989 (52 FR 41534).

Section 1414 (a)(1)(A): During periods when a State has primary enforcement responsibility ("primacy") for PWSS, this Section requires the Administrator to notify the primacy State and the violating public water supplier of the supplier's noncompliance, and further requires providing appropriate advice and technical assistance to the primacy state and supplier to eliminate the noncompliance.

Section 1414 (c): Requires the Administrator to amend by September 19, 1987, present regulations governing the manner, form and content by which a public water supplier shall give the public notification of its violations of the Act.

Section 1417: Requires public water systems to notify its customers of lead contamination from materials used in the water system. Requires the Administrator by September 17, 1986, to notify states of their obligations to prohibit by June 19, 1988, the use of lead pipe, solder or flue in the installation or repair of public water systems.

Section 1445 (a)(5): Requires public water suppliers supplying at least 150 service connections which have monitored unregulated contaminants pursuant to regulations to be developed by the Administrator to notify both the Administrator and its customers of the availability of the monitoring results.

Underground Injection Control Programs (UIC)

Section 1423 (a): Requires the Administrator to notify the primacy State and the violating underground injector of the injector's noncompliance. Also requires the Administrator to issue orders (pursuant to § 1423 (c), below) requiring compliance or to bring civil judicial action.

B. ADMINISTRATIVE ENFORCEMENT ACTIONS (Administrative orders are generally issued by EPA to Federal facilities on consent only. However, if a Federal facility fails to respond to a proposed order within a specified time period (usually 30 days), the order becomes final and effective. Where EPA does not have statutory administrative order authority for Federal facilities, Compliance Agreements are used.)

PWSS

Section 1414(a)(1)(B): If a primary State does not start enforcement action within 30 days after the Administrator's notice (§ 1414(a)(1)(A), above) the Administrator must either issue an order requiring the PWSS to comply, or must start civil judicial action.

Section 1414 (a) (2): Gives the Administrator the same authority as in § 1414(a)(1)(A) and (B), except this section applies to periods when a State does not have primary enforcement responsibility for PWSS.

Section 1414 (g): Gives authority for the orders noted above (i.e., for violations of Part B of the Act as well as for § 1445 violations). The order authority cannot be exercised until the water supplier has had the notice and opportunity for a public hearing and, in the case of the primacy states, until the State has had the opportunity to confer with the Administrator. Violating or failing to comply with an order is liable for a maximum civil penalty of $25,000/day. If the fine does not exceed $5,000, it may be assessed administratively by the Administrator after conformance with APA procedures.

Section 1417(c): If the Administrator determines that § 1417 is not being enforced by a State as required by § 1417 (b), he may withhold up to 5 percent of Federal funds available to the State for State program grants under § 1443(a).

Section 1431(a): Provides authority for the Administrator to issue an administrative order in circumstances of "imminent and substantial endangerment to persons" resulting from actual or likely contamination of a public water system or drinking water aquifer.

Compliance Agreements: Are the primary enforcement mechanisms for enforcement against Executive Branch Agencies which are signed by both parties to indicate agreement on actions and schedules that are needed to reach compliance.

UIC

Section 1423 (c): Provides authority for the Administrator to issue to persons violating Part C (or § 1445 of the Act) which governs injection practices. The orders may require compliance or assess penalties, or both, after following statutory requirements that provide for less than APA procedures. Administrative penalties assessed under this provision may not exceed $125,000.

Section 1431(a): Provides authority for the Administrator to issue an administrative order in circumstances of "imminent and substantial endangerment to persons" resulting from actual or likely contamination of a public water system or drinking water aquifer.

Compliance Agreements: Used by the program which are signed by both parties to specify compliance actions and schedules and outlines additional actions to be taken if the agreement is not complied with.

C. CIVIL JUDICIAL ACTIONS (EPA may not use these authorities for Federal facilities, although they can be exercised against contractors at GOCO facilities.)

PWSS

Section 1414 (b): Provides authority for the Administrator to initiate a civil action to require the public water system to comply with the regulations or requirements of the Act under § 1414(g)(3)(c). Violation of or noncompliance with an Administrative Order for which a civil penalty of over $5,000 is being sought (subject to a $25,000/day maximum) shall be obtained through a civil action.

Section 1431 (a): Provides authority for the Administrator to take a civil action for appropriate relief (including restraining orders and temporary or permanent injunctions) against persons whose activities affecting a drinking water system or underground drinking water source represent an "imminent and substantial endangerment" to human health.

Section 1432(c): Provides authority for a judicially-imposed civil penalty of up to $50,000 for tampering with a public water system and up to $20,000 for threatening or attempting to tamper with such a system.

UIC

Section 1423 (b): Provides authority for the Administrator to commence a civil action to require compliance with any requirement of an UIC program or order. This section also provides authority for the imposition of a civil penalty of up to $25,000/day. This authority will not be used to enforce against Executive Branch Agencies.

D. CRIMINAL JUDICIAL ACTIONS (These may be exercised against individual employees of Federal agencies as well as private parties.)

PWSS

Section 1432: Tampering with a Public Water System may result in a maximum of five years in prison or fined in accordance with Title 18 of the U.S. Code. Attempting or threatening to tamper with a system may result in a maximum of three years in prison or fined in accordance with Title 18 of the U.S. Code.

UIC

Section 1423 (b): Willful violations of any requirement of an applicable Underground Injection Control programs or order carries a maximum penalty of up to three years imprisonment and/or fines in accordance with Title 18 of the U.S. Code.

IV. TOXICS AND PESTICIDES

*** FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT (FIFRA) ***

A. ADMINISTRATIVE NOTIFICATION ACTIONS (These are formal notifications advising recipients of violations detected and/or actions required to be taken. These notifications generally may be issued to all Federal facilities.)

Section 14 (a)(2): Authorizes issuance of a Notice of Warning letter which is required for first offenses committed by a private applicator.

Section 9 (c)(3): Authorizes issuance of a Notice of Warning Letter which may be issued for first offenses committed by commercial applicators, registrants, distributors and "for hire" applicators.

Notice of Termination of Registration may be sent to a Federal facility which fails to submit required pesticide reports to the EPA.

EPA may also request that a company voluntarily recall a product. These requests are not explicitly authorized by FIFRA.

Section 13 (a) - Can be used for Federal Facility.

Section 3 (c)(2)(B) Suspension. If a registrant fails to agree to produce data as required by FIFRA § (c)(2)(B), EPA may suspend the product for which the data was requested. Applies to Federal entities.

Section 6 Emergency Suspension/Suspensions/Cancellations. Agency may cancel/suspend the registration of products for unreasonable adverse effects. Can be issued to Federal Facility.

B. ADMINISTRATIVE ENFORCEMENT ACTIONS (Administrative orders are generally issued by EPA to Federal facilities on consent only. However, if a Federal facility fails to respond to a proposed order within a specified time period (usually 30 days), the order becomes final and effective. Where EPA does not have statutory administrative order authority for Federal facilities, Compliance Agreements are used.)

EPA may deny, suspend, modify or revoke an applicator's certification for any violation of FIFRA or its regulations.

Section 13(a): Authorizes issuance of Stop Sale, Use or Removal Orders (SSURO's) to prohibit the sale or use of a violative pesticide. Violation of a SSURO is grounds for a civil or criminal penalty. SSURO's are directly challengeable in Federal District Court. These can be issued to Federal facilities.

Section 14: Authorizes the use of administrative civil penalties for violations of FIFRA. Commercial applicators, registrants and other categories of violators are liable for a maximum penalty of $5,000 per offense; private applicators are liable for a maximum penalty of $1,000 per offense. This authority is not used for enforcement actions against Executive Branch Agencies.

Compliance Agreements: Used as the primary enforcement mechanism for enforcement against Executive Branch Agencies which are signed by both parties to indicate agreement on actions and schedules that are needed to reach compliance.

C. CIVIL JUDICIAL ACTIONS (EPA may not use these authorities for Federal facilities, although they can be exercised against contractors at GOCO facilities.)

Section 16 (c): Authorizes injunctive relief for violations of SSURO's or suspension orders.

Section 13 (b): Authorizes civil actions to seize violative products.

D. CRIMINAL JUDICIAL ACTIONS (These may be exercised against individual employees of Federal agencies as well as private parties.)

Section 14 (b): Criminal penalties are provided for "knowing violations" of any provision of the Act. Penalties range up to a $25,000 fine and one year in prison, or both.

*** TOXIC SUBSTANCES CONTROL ACT (TSCA) ***

A. ADMINISTRATIVE NOTIFICATION ACTIONS (These are formal notifications advising recipients of violations detected and/or actions required to be taken. These notifications generally may be issued to all

Federal facilities.)

Notice of Noncompliance: This is a letter from EPA advising the recipient that a TSCA violation has been detected. It is not authorized by the statute and is used primarily for minor technical or substantive violations which do not have significant impact upon health or environment.

B. ADMINISTRATIVE ENFORCEMENT ACTIONS (Administrative Orders are generally issued by EPA to Federal facilities on consent only. However, if a Federal facility fails to respond to a proposed order within a specified time period (usually 30 days), the order becomes final and effective. Where EPA does not have statutory administrative order authority for Federal facilities, Compliance Agreements are used.)

* Section 16 (a): Authorizes EPA to impose civil administrative penalties for noncompliance with TSCA statutory, order, and rule requirements including; §4 test rule, §5 premanufacture notification and significant new use notification requirements, §5 and §6 orders, §6 chemical control rules, §8 reporting and recordkeeping requirements and rules, §12 labelling and notification requirements, and §13 import certification requirements. Section 16(a)(2)(C) allows all or part of the penalty to be compromised, modified, or remitted, with or without conditions. (This authority is not used to enforce against Executive Branch agencies.)

Compliance Agreements: Used as the primary enforcement mechanism for enforcement against Executive Branch Agencies which are signed by both parties to indicate agreement on actions and schedules to reach compliance.

C. CIVIL JUDICIAL ACTIONS (EPA may not use these authorities for Federal facilities, although they can be exercised against contractors at GOCO facilities.)

Section 5 (e): Authorizes injunctive action to prohibit or limit manufacture, processing, distribution in commerce, use, or disposal of a new chemical substance or a substance for a significant new use for which there is insufficient information to permit a reasoned evaluation of the effects. The court may issue an injunction if it finds that activities involving the substances may present an unreasonable risk of injury or that the substance is or will be produced in substantial quantities and enters or may reasonably be anticipated to enter the environment in substantial quantities or there is or will be significant or substantial human exposure to it.

Section 5 (f): Authorizes injunctive action to prohibit manufacture, processing, or distribution in commerce of a new chemical substances or a substance for a significant new use, if the court finds that activities involving the substance will present an unreasonable risk of injury before a rule promulgated under TSCA § 6 can protect against such risk.

Section 7: Authorizes civil actions for seizure of imminently hazardous chemical substances or mixtures (chemicals) or articles containing them, for injunctive relief against persons who manufacture, process, distribute in commerce, use, or dispose of imminently hazardous chemicals or articles containing them, or for recall of the chemical substance.

Section 11: Subpoena and Inspection Authority. This can be used for Federal facilities.

Section 17: Authorizes civil actions for seizure of chemicals or articles containing them which were manufactured, processed, or distributed in commerce in violation of TSCA or a TSCA rule or order or for injunctive relief to restrain violations of TSCA or rules or orders under TSCA, to require persons who manufactured or processed chemicals in violation of §§ 5 and 6 orders and rules to notify customers of the violations, to notify the public of any risk of injury, and to replace or repurchase such chemicals.

D. CRIMINAL JUDICIAL ACTIONS (These may be exercised against individual employees of Federal agencies as well as private parties.)

Section 16 (b): Authorizes criminal actions for knowing or willful noncompliance with TSCA statutory, rule, and order requirements such as those subject to § 16(a) civil administrative penalties above. Penalties include a maximum of $25,000 for each day of violations, one year in prison, or both.

Section 16 (b): Provides criminal penalties for anyone who knowingly or willfully violates requirements relating to §§ 4,5,6,8, and 11 of the Act. Penalties include a maximum fine of up to $25,000/day and one year in prison, or both.

*** TSCA Title II - Asbestos Hazard Emergeny Response Act of 1986 ***

Section 208. Emergency Action: Authorizes administration to act to protect health and the environment when local educational agency fails to take sufficient action and the situation poses imminent substantial endangerment.

Section 208. Injunctive Relief: Administration may ask for injunctive relief if asbestos in a school building poses an imminent and substantial endangerment to human health or the environment.

APPENDIX J

SAMPLE ENFORCEMENT RESPONSE FORMS AND LETTERS

NOTIFICATION OF VIOLATION (NOV)*

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Facility Contact
Facility Address

Re: Notification of Violation - [Name of Facility and I.D.#]

Dear [Name of Contact]:

- The opening statement should include the following information concerning the inspection:
  - Date
  - Type and purpose
  - Names and affiliation of inspectors
- Following the opening statement, the NOV should discuss the results of the inspection, including:
  - A description of each violation.
  - A citation of the appropriate regulation or the statute.
  - A description of necessary corrective actions, if appropriate.
- The closing statement should:
  - State that the facility must submit either a remedial action plan and schedule or written certification that the violation has been corrected by a specified date consistent with applicable media timeframes.
  - Any remdial action plan should contain the following elements:
    - description of noncompliance situation
    - identification of corrective actions to be taken
    - outline of schedule for obtaining required funds implementing corrective actions
    - description of content and frequency of progress reports
  - State the number of days EPA will take to review and comment on the remedial action plan.

---

* When using an enforcement action under RCRA refer to the January 25, 1988 memorandum contained in Appendix K.

- Provide the name and address of where the response is to be sent.

- Explain the adverse consequences of not submitting a remedial action plan or written certification in a timely manner. The following sentence may be used in a NOV, "Failure either to respond to this request by (date), or to achieve compliance or mutual agreement on an acceptable response to the above cited violations by (date) will result in further escalation of this enforcement action." Relevant citizen suit provisions of involved statutes may also be cited here.

- Offer to meet with the Federal agency official authorized to sign a Compliance Agreement and commit the agency to actions described in the remedial action plan.

Sincerely yours,

[Name and Title]

RESPONSE FORM FOR CERTIFICATION OF VIOLATION CORRECTION

[Date]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Facility Contact]
[Facility Address]

Re: Certification of Violation Correction

Dear [Facility Contact]:

EPA acknowledges receipt of the facility name certification of violation correction. The certification addresses the violations identified in the name enforcement response, dated ______. The facility should continue to take the necessary steps to maintain and ensure compliance with all applicable Federal, State, and local environmental requirements.

If you have any questions, please call Federal Facilities Coordinator or Program Staff name and number of my staff.

Sincerely,

Delegated Regional Enforcement Official
EPA Division

RESPONSE FORM FOR REMEDIAL ACTION PLAN

[Date]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Facility Contact]
[Facility Address]

Re: Remedial Action Plan

Dear [Facility Contact]:

EPA acknowledges receipt of the facility name remedial action plan, dated _____. EPA will complete its review by date. At that time we will notify you of our comments. However, EPA's receipt of the plan does not alter the facility name liability for correcting the stated violation in a timely manner and for taking all necessary steps to maintain compliance with all applicable Federal, State, and local environmental requirements. While a remedial action plan may be used as the basis for substantive agreement on steps necessary to achieve compliance, it is not an enforceable agreement or order and may only provide the basis for such enforcement agreements or orders in those cases where these enforcement responses are deemed necessary.

If you have any questions, please call Federal Facilities Coordinator or Program staff name and number of my staff.

Sincerely,

Delegated Regional Enforcement Official
EPA Division

COMPLIANCE AGREEMENT

U.S. ENVIRONMENTAL PROTECTION AGENCY

Name of Federal Facility and EPA Region ________	Federal Facility Compliance Agreement

I
INTRODUCTION

The introductory paragraph should state the following:

The U.S. Environmental Protection Agency, Region ____ (hereinafter Region _____), and the (Facility name and location) (hereinafter abbreviated facility name) are the parties to this agreement which is entered into pursuant to Executive Order 12088, October 13, 1978 [43 FR 47707]. The Office of Management and Budget and the Department of Justice will take cognizance of this agreement pursuant to their respective duties to assure compliance with the environmental laws under Executive Order 12088 and the particular statutes herein addressed.

A statement of agreement between the Federal facility and EPA should include the following;

Executive Order 12088 was promulgated to insure Federal compliance with applicable pollution control standards. This agreement contains a "plan", as described in Section 1-601 of Executive Order 12088, to achieve and maintain compliance with applicable name of relevant statute(s) standards for the name of facility.

II
STATEMENT OF FACTS

This paragraph should provide a description of the site in question and the violations identified. The paragraph should detail the objectives and scope of the agreement between the facility and EPA.

III

COMPLIANCE SCHEDULE

This paragraph should state the following:

The compliance schedule for the facility named is intended to achieve compliance as expeditiously as practicable, pursuant to Section 1-601 of Executive Order 12088, and is set forth as Appendix __ to this agreement. The attachment is incorporated into and made a part of this agreement. The schedule was determined after consultation between Facility name and Region ___. The schedule contains interim requirements reflecting design and construction milestone dates. Wherever reasonably possible, name of Facility will expedite the schedule.

IV

FUNDING

If existing Agency funds are available to correct the violations, the following paragraph should be stated:

Facility name has determined that the funds necessary to correct the violations identified above are available for this purpose and Agency name shall obligate such funds as necessary to meet the timeframes for achieving compliance as outlined in the attached schedule. If facility name subsequently determines that additional funds are needed to achieve compliance, it shall seek all existing funds for this purpose by the most expeditious means possible or, if necessary, shall request new authorizations in the Agency's budget in order to ensure the most expeditious schedule of compliance in accordance with sections 1-4 and 1-5 of Executive Order 12088 as implemented by the Office of Management and Budget Circular A-106 (As Amended). Section 1-5 of E.O. 12088 states that "The head of each executive agency shall ensure that sufficient funds for compliance with applicable pollution control standards are requested in the Agency budget." Failure to obtain adequate funds or appropriations from Congress does not, in any way, release Facility name from its ultimate obligation to comply with name of relevant statute(s) as expeditiously as possible.

COMPLIANCE AGREEMENT
(continued)

If Federal agency funds are either unavailable or inadequate to correct the violations, then the following paragraph should be stated:

All existing funds shall be sought for this purpose by the most expeditious means possible, and/or new authorizations sought from Congress, if necessary, to achieve the attached schedule of compliance in accordance with Sections 1-4 and 1-5 of Executive Order 12088 as implemented by the Office of Management and Budget Circular A-106 (As Amended). Section 1-5 of E.O. 12088 states "The head of each executive agency shall ensure that sufficient funds for compliance with applicable pollution control standards are requested in the Agency budget." Failure to obtain adequate funds or appropriations from Congress does not, in any way, release Facility name from its obligation to comply with name of relevant statute(s).

V
REPORT REQUIREMENTS

The following should be included as Report Requirements:

- Name of Facility shall submit quarterly progress reports by a set date and upon the final compliance date as set forth in the attachment. The progress reports will be submitted to Region __ and the appropriate local, State or regional environmental agency. The status reports shall indicate compliance or noncompliance with the schedule. In the event of noncompliance, the report shall include the cause of noncompliance and any remedial actions taken. If delay is anticipated in meeting any schedule date, name of facility shall immediately notify Region __ in writing of the anticipated delay, describing in detail the anticipated length of delay, the precise cause of the delay, the measures taken and to be taken by name of facility to prevent or minimize the delay and the timetable by which the measures shall be implemented. Name of facility will take reasonable action to minimize any delay.

COMPLIANCE AGREEMENT
(continued)

- In the event there is an amendment of the Act, or changes to the regulations promulgated under those statutes, the compliance schedule may be renegotiated to reflect these changes. Such renegotiation shall be governed by Executive Order 12088. During the pendency of any renegotiation, the attached compliance schedule, to the extent it does not conflict with statutory or regulatory changes, shall remain in effect unless specifically waived by Region __.

- On the date for final compliance, as shown on the Attachment, compliance with applicable permit requirements must be demonstrable by testing and positive reporting of the achievement of compliance, rather than by the mere completion of construction of pollution abatement facilities.

- Upon the demonstration of compliance by name of facility, there will be a continuing obligation to comply with applicable permit requirements under the Act.

- If funds are not appropriated from Congress as requested and existing funds are not available to achieve compliance in accordance with the attached schedule, the Facility name shall notify the EPA immediately in writing.

VI
CONFLICT RESOLUTION

This paragraph should read as follows:

In the event of any conflict involving violations of this agreement, Region __ and name of facility shall meet promptly and work in good faith for a period of not less than thirty (30) days in an effort to reach a mutually agreeable resolution of the dispute. (If Region __ and name of facility are unable to reach agreement, then they may select an alternative dispute resolution procedure to aid in the resolution of the dispute. This procedure shall be for a period not to exceed __ calendar days.)* If the differences cannot be resolved by the two parties in a timely manner, a proposed Order may be issued by EPA as appropriate, and the escalation procedures in Sections 1-602, 1-603, and 1-604 of Executive Order 12088 shall apply. Additional dispute resolution procedures may also be utilized if mutually agreed to by both parties as part of this agreement.

"* Regions may add this sentence on ADR as appropriate."

VII
SANCTIONS

This section should state that enforcement measures specified under the specific act violated will be used should the facility not comply with this agreement. Enforceability clauses should be included in this section where appropriate.

VIII
CLOSING STATEMENT

This paragraph should read as follows:

> This agreement in no way modifies Section (number) of the name of Act. Nothing in the Agreement is intended to nor should be construed to affect the rights of nonparties to the Agreement.

Date: ____________ Signed: ____________
(Facility Contact Name Title)

Date: ____________ Signed: ____________
(EPA Name and Title)

FEDERAL FACILITY ENFORCEABILITY CLAUSES

Enforceability clauses can be included in new Federal Facility Compliance Agreements or Consent Orders or be added to existing Federal Facility Compliance Agreements, where feasible. The following is an example of acceptable language from the RCRA program:

The (Department/Agency) recognizes its obligations to comply with RCRA as set forth in Section 6001 of RCRA.

The provisions of this Agreement including those related to statutory requirements, regulations, permits, closure plans, or corrective action, including recordkeeping, reporting and schedules of compliance, shall be enforceable under citizen suits pursuant to 42 U.S.C. 9672(a)(1)(A), including actions or suits by the State and its agencies. The (Department/Agency) agrees that the State and its agencies are a "person" within the meaning of Section 7002(a) of RCRA.

In the event of any action filed under Seciton 7002(a) of RCRA alleging any violation of any such requirement of this Agreement, it shall be presumed that the provisions of this Agreement including those provisions which address recordkeeping, reporting, and schedules of compliance are related to statutory requirements, regulations, permits, closure plans, or corrective action, and are thus enforceable under Section 7002(a) of RCRA.

NOTIFICATION FORM TO FEDERAL FACILITY OF ENFORCEMENT ACTION AGAINST CONTRACTOR

[DATE]

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

[Facility Contact]
[Facility Address]

Re: Enforcement Action Against [Facility Contractor]

Dear [Facility Contact]:

Attached is a copy of the Environmental Protection Agency's (NOV, Administrative Complaint or other) against contractor name for violations of the name of statute at the name of Federal facility.

We request your cooperation in working with the contractor so that the violation will be corrected and the facility returned to compliance as quickly as possible. We want to emphasize the importance of your responsibility to effectively oversee contractor operations to ensure compliance.

EPA may also decide whether subsequent enforcement actions may be necessary against other parties in order to correct the violation.

If you have any questions about the enforcement action, please call Federal Facilities Coordinator or program staff name and number of my staff.

Delegated Regional Enforcement Official
EPA Division

APPENDIX K

ENFORCEMENT ACTIONS UNDER RCRA AND CERCLA AT FEDERAL FACILITIES

AND

ELEVATION PROCESS FOR ACHIEVING FEDERAL FACILITY COMPLIANCE UNDER RCRA

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
SOLID WASTE AND EMERGENCY RESPO

JAN 25 1988

MEMORANDUM

SUBJECT: Enforcement Actions Under RCRA and CERCLA at Federal Facilities

FROM: J. Winston Porter, Assistant Administrator
Office of Solid Waste and Emergency Response

TO: Regional Administrators
Regions I-X

BACKGROUND

Statutory language makes it clear that Federal facilities must comply both procedurally and substantively with RCRA and CERCLA in the same manner as any non-Federal entity. The purpose of this memo is to lay out the statutory authorities under RCRA and CERCLA that EPA may use at Federal facilities to achieve compliance and expeditious cleanup.

Over the past year, a great deal of effort has been spent identifying those enforcement tools that are available to EPA in the hazardous waste programs to achieve a higher level of compliance at Federal facilities. Specifically, the successful negotiation of individual agreements such as the corrective action order with the Department of Energy (DOE) at the Idaho National Engineering Lab and the Interagency agreement with the Department of Army (DOA) at the Twin Cities Army Ammunition Plant demonstrated significant progress in efforts to achieve compliance and cleanup at Federal facilities. Further clarification of EPA's enforcement capabilities at Federal facilities has come from the Department of Justice in Congressional testimony.

To continue the above progress in resolving compliance and cleanup issues at Federal facilities, I am outlining the enforcement and permitting response actions that EPA can currently implement to formalize compliance and cleanup actions at Federal facilities. A description of the available enforcement and permitting response actions is given for each of the following scenarios.

1) A Federal facility with RCRA compliance issues.

2) A Federal facility with RCRA corrective action issues.

3) A Federal facility with CERCLA issues.

4) A Federal facility with RCRA and CERCLA issues.

I. A FEDERAL FACILITY WITH RCRA COMPLIANCE ISSUES

At a Congressional hearing on April 28, 1987 before the House Oversight and Investigation Sub-Committee, of the Committee on Energy and Commerce, the U.S. Department of Justice testified that EPA may not issue Administrative Orders at Federal facilities under Section 3008(a) of RCRA to address compliance violations of regulatory requirements. (See Attachment 1 for a copy of DOJ's Congressional testimony). When addressing RCRA compliance violations, EPA will issue the Federal facility a Notice of Noncompliance (NON). EPA will then negotiate a Federal Facility Compliance Agreement (FFCA) to resolve the compliance issues outlined in the NON. Detailed below is a description of the components of a NON and a FFCA.

A. Federal Facility Notice of Noncompliance

EPA will issue a Notice of Noncompliance (NON) as the initial enforcement action at a Federal facility with RCRA compliance violations. The notice should be sent to the responsible Federal official at the facility, or their delegate. The issuance of a NON at a Federal facility is parallel to the issuance of a RCRA Section 3008(a) administrative complaint to a private facility and, therefore, must conform with a RCRA Section 3008(a) complaint in content and format. As outlined in the model language (Attachment 2), the NON should contain the following components:

1) A general reference to the Resource Conservation and Recovery Act as amended.

2) The factual basis for the issuance of the NON (e.g., acts, omissions and conditions identified during an inspection).

3) A reference to the waiver of sovereign immunity under Section 6001 of RCRA.

4) A reference to the citizen suit provisions of Section 7002 of RCRA.

5) A reference to administrative, civil, and/or criminal sanctions under Section 3008 of RCRA that may be applied to an individual who is in charge of hazardous waste management activities at a facility.

6) A detailed allegation of all RCRA violations with citations to authorized state or EPA regulations.

7) A detailed compliance schedule (both actions and timeframes) for the correction of violations.

8) The alternatives to the actions provided for in the NON (e.g., Presidential exemption or specific legislative relief from Congress).

9) A specific date or timeframe by which the Federal facility must provide a written response to EPA regarding their plans for addressing the violations outlined in the document and/or a specific date for a conference.

It is essential that the NON specify the violations, remedy, and timeframes for implementing the remedy in the same manner that a strong administrative or civil complaint would be drafted.

B. Federal Facility Compliance Agreement

After the NON has been issued, the final negotiated document resolving compliance violations between the Federal facility and EPA will continue to be called a Federal Facility Compliance Agreement (FFCA). A very important section in any new FFCA is the enforceability clause. Model enforceability language is attached (Attachment 3) for your inclusion in any new FFCA. Where appropriate, and when you can obtain expeditious agreement from the affected Federal facility, you should add the enforeability clause to existing Federal Facility Compliance Agreements as well. This language reflects EPA's view that a "requirement" in Section 7002 includes statutory and regulatory requirements and other items which are mandated by these requirements (e.g., schedules of compliance, various plans, recordkeeping and reporting) and that this final negotiated document is enforceable under Section 7002. This language also recognizes that under RCRA Section 6001, Federal agencies are required to comply with the agreement, subject to available appropriations.

All FFCAs should contain the model dispute resolution clause found at Attachment 4. This dispute resolution language emphasizes resolution of disputes at a lower level. In cases where disputes are escalated to higher levels, the EPA Administrator is the final decision maker.

C. Issuance of RCRA Section 3008(a) Order to a Government-Owned Contractor Operated Facility (GOCO)

When addressing RCRA compliance issues at a Federal facility, EPA also has the option of issuing an enforcement action against the non-Federal operator of a facility. In many cases, contractors have the operational responsibility for waste generation and management operations at a Federal facility.

At the aforementioned Congressional hearing on this topic, DOJ stated that they saw no constitutional or statutory problems to asserting Section 3008 authority (or any other authority) against contract operators of government-owned facilities (GOCOs)(see Attachment I, DOJ Testimony). This means that EPA and the states have the full range of enforcement authorities under RCRA and CERCLA at GOCOs that are available for private facilities.

Actions against GOCOs can be valuable enforcement tools, especially at facilities where the contractor does the majority of the waste management work (i.e., DOE facilities). On a factual basis EPA has not experienced trouble establishing the contractor as the operator. The Mixed Energy Waste (MEWS) task force found that at most of the major DOE facilities the contractor(s) were responsible for the day-to-day operations and long term management, or oversight of hazardous waste at the facility. In some instances, both the Federal agency and the contractor(s) are the operators. A memo labeled Attachment 5 in this package gives some criteria for determining the operator at a Federal facility.

GOCOs are not shielded from enforcement actions for non-compliance with environmental laws. Therefore, I strongly encourage you to determine who is the operator of hazardous waste management activities at a Federal facility when developing an enforcement strategy at the facility. You should then examine the factual association of the contractor at the facility. When the primary operator at a Federal facility is clearly the contractor(s), and the factual basis for the enforcement action is clearly defined, you should consider the use of all RCRA and CERCLA authorities available for non-Federal facility actions. The Federal Facilities Compliance Task Force in the Office of Waste Programs Enforcement and the Office of Enforcement and

Compliance Monitoring will be working with your staff to identify those cases which may be good candidates for a GOCO enforcement action.

II. A FEDERAL FACILITY WITH RCRA CORRECTIVE ACTION ISSUES

A. Corrective Action Orders (3008(h)) at Federal Facilities

With regard to corrective action and the applicability of administrative orders under RCRA Section 3008(h) at Federal facilities, DOJ has taken the view that corrective action orders are integral to the permitting process. Since Section 6001 of RCRA expressly requires Federal facilities to comply with hazardous waste permits, DOJ has concluded that administrative orders under Section 3008(h) can be issued to Federal facilities.

Based on this DOJ determination, Section 3008(h) administrative orders should be issued whenever possible and appropriate (e.g., an interim status facility which is not seeking a RCRA permit or the issuance of the permit is not expected in the near future). The existing administrative procedures for issuing RCRA 3008(h) orders, as set forth in the February 19, 1987 memorandum to the regional offices, will be applied to Federal agencies. However, Federal agencies will have the opportunity to elevate disputes to the Administrator for a final decision in the event a dispute cannot be resolved at the Regional Administrator level. Consistent with these procedures, EPA will issue orders as necessary, and provide a reasonable opportunity for Federal agencies to discuss the order with EPA. If the Federal agency chooses not to invoke these procedures, the order becomes final and effective.

As in the NON and FFCA, a Section 3008(h) order being issued to a Federal facility should state the waiver of sovereign immunity found in Section 6001 of RCRA. It should also contain the model dispute resolution language found in Attachment 4. The the model enforceability language found in Attachment 3 is not necessary since the order will explicitly cite the statutory authority in Section 3008(h), and is, therefore, enforceable under Section 7002 of RCRA. There should be no difference in the factual basis for the issuance of a corrective action order between a private facility and a Federal facility. The initial order should be sent to the responsible Federal official at the facility, or their delegate.

B. Issuance of a 3008(h) Order to a Government-Owned Contractor-Operated Facility (GOCO)

As described in Part III, RCRA Compliance, Section C, DOJ has determined that EPA has the authority to exercise all of its Section 3008 enforcement options at GOCOs. This authority is not limited to RCRA compliance issues under Section 3008(a). It includes corrective action authorities under Section 3008(h) and Section 3013 of RCRA. All CERCLA enforcement authorities apply to GOCOs as well.

III. A FEDERAL FACILITY WITH CERCLA COMPLIANCE ISSUES

A. Section 120 Interagency Agreements

Under Section 120 of the Comprehensive Environmental Response Compensation and Liability Act as amended by the Superfund Amendments and Reauthorization Act (hereinafter referred to as CERCLA), Federal agencies must enter into an "interagency" agreement (IAG) for all necessary remedial actions at Federal facilities on the NPL.

The Agency is viewing the Section 120 Interagency agreement as a comprehensive document to address hazardous substance response activities at a Federal facility from the remedial investigation/ feasibility study (RI/FS) through the implementation of the remedial action. All such interagency agreements must comply with the public participation requirements of Section 117. The timetables and deadlines associated with the RI/FS and all terms and conditions associated with the remedial actions (including operable units or interim actions) are enforceable by citizens and the States through the citizen suit provisions of Section 310 of CERCLA. In addition, Section 122(l) of CERCLA authorizes the imposition of civil penalties against Federal agencies for failure to comply with interagency agreements under Section 120. Procedures for imposing these penalties are provided for in Section 109 of CERCLA.

B. Other CERCLA Authorities Available at Federal Facilities

EPA has the authority to issue administrative orders to Federal agencies under Section 104 and Section 106 of CERCLA. Section 106 orders should be used where needed to assure compliance with Federal facility requirements for response action. Orders under Section 104(e)(5)(A) of CERCLA can be used to collect information and obtain access to Federal agency sites where needed.

Executive Order 12580 clarifies that EPA is authorized to issue Section 104 and Section 106 administrative orders to other Federal agencies, with the concurrence of the Department of Justice. Section 4(e) of the Executive Order provides that:

> Notwithstanding any other provision of this Order, the authority under Section 104(e)(5)(A) and Section 106(a) of the Act to seek information, entry, inspection, samples or response action from Executive Departments and agencies may be exercised only with the concurrence of the Attorney General.

CERCLA enforcement authorities under Section 106, both administrative and judicial, can be used against government contractors at Federal facilities. Administrative orders against contractors do not require concurrence of the Department of Justice. In addition, Section 120(e)(6) provides that, if the Administrator determines that the response actions can be done properly at the Federal facility by another responsible party, then the Administrator may enter into an agreement with such party under the settlement provisions of Section 122 of the statute. Following the approval by the Attorney General of any such agreement relating to a remedial action, the agreement will be entered in the appropriate United States district court as a consent decree under Section 106 of CERCLA.

States also have a variety of enforcement authorities under CERCLA, so the exercise of EPA's enforcement authorities should be closely coordinated with the States. First, Section 121(e)(2) of CERCLA authorizes States to enforce any Federal or state standard, requirement, criteria or limitation to which the remedial action must conform under CERCLA. Second, Section 310 authorizes citizen suits to require Federal agencies to comply with the standards, regulations, conditions, requirements, or orders which have become effective pursuant to CERCLA including IAGs under Section 120 of the Act. Third, Section 120(a)(4) clarifies that State laws concerning removal and remedial action, including State laws regarding enforcement, are applicable at Federal facilities not included on the NPL. In addition, Section 120(i) states that nothing in CERCLA Section 120 shall affect or impair the obligation of the Federal agency to comply with the requirements of RCRA, including corrective action requirements (see section IV.C., "Importance of the States as a Party to the IAG"). EPA enforcement actions against Federal agencies should therefore be carefully coordinated with States, to avoid potentially duplicative or conflicting exercises of authority.

IV. A FEDERAL FACILITY WITH CERCLA AND RCRA ISSUES

In many cases, facilities subject to an IAG will also have RCRA liabilities. The most common example of the RCRA/CERCLA overlap is where a unit(s) at the facility has interim status or a permit under RCRA and a portion of the facility is undergoing a CERCLA remedial investigation.

A. Enforcement Options

When developing a comprehensive strategy for addressing both RCRA and CERCLA issues at a Federal facility, EPA and the states should consider the following options, alone or in combination, as possible mechanisms for getting enforceable requirements in place:

1. A RCRA permit

All RCRA Subtitle C permits issued after November 8, 1984, will contain provisions for implementing the corrective action requirements of 40 CFR Part 264 Subpart F (or authorized state requirements), and Section 3004(u) and (v) of RCRA. For facilities that have or are seeking a RCRA permit, the requirements for a "CERCLA" remedial investigation and cleanup could be met by implementing these requirements through RCRA corrective action. It is important to keep in mind, however, that the extent of coverage of the RCRA permit is generally limited to hazardous wastes/constituents (e.g., some CERCLA hazardous substances such as radionuclides are not RCRA hazardous constituents and, therefore, the permit may not be able to address all of the releases at a facility).

2. A RCRA Corrective Action Order

The corrective action authority under Section 3008(h) of RCRA can be used at RCRA interim status facilities to address releases from RCRA regulated units and other solid waste management units. At a Federal facility that has interim status, a RCRA corrective action order could address the investigation and clean-up of releases in lieu of a "CERCLA" response action or as an interim measure. (Again, the extent of coverage in the RCRA corrective action order is limited to RCRA hazardous wastes/constituents.)

3. Imminent and Substantial Endangerment Orders

CERCLA Section 106 can be used to address releases from RCRA units or CERCLA sites when an "imminent and substantial endangerment" is shown.

4. An Interagency Agreement under Section 120 of CERCLA

A Section 120 IAG could be drafted to incorporate all RCRA corrective action requirements and CERCLA statutory requirements. Where some or all of a Federal installation has been listed on the NPL, the CERCLA Section 120 IAG is required for remedial action by statute.

The first agreement under Section 120 of CERCLA (IAG) was finalized on August 12, 1987. The IAG at Twin Cities Army Ammunition Plant (TCAAP) is a three party agreement between EPA, the State of Minnesota, and the U.S. Department of the Army. Several notable provisions that should be incorporated in every CERCLA Section 120 IAG include a dispute resolution process that denotes the EPA Administrator as the final decision maker, an enforceability clause which states that provisions of the agreement are enforceable by citizens and the State through the citizen suit provision of Section 310 of CERCLA, and a means for resolving both the RCRA and CERCLA requirements when both statutes apply. Further guidance on CERCLA Section 120 agreements is being developed and will be made available to the Regions as soon as possible. In the interim, the Regions should consult with Headquarters on any IAG issues they encounter.

B. Strategy for Action at RCRA/CERCLA Sites

The decision on which of the above mechanisms to employ at a Federal facility will be made on a facility specific basis. However, if the Federal facility is on the NPL or is likely to be placed on the NPL, I encourage the use of a Section 120 IAG to incorporate both RCRA and CERCLA activities under one enforceable agreement and to serve as a comprehensive plan for investigatory and remedial activities at the facility, whether RCRA or CERCLA. EPA, the State, and the Federal facility would agree on a facility wide strategy, setting priorities and schedules for action. If properly framed, the agreement would satisfy the facility's RCRA corrective action requirements,as well as the public participation requirements of Section 117 of CERCLA and Part 124 of RCRA. At a later date, if appropriate, corrective/ remedial action requirements found in the IAG could be incorporated into the RCRA permit for those facilities seeking an operating or post-closure permit, in satisfaction of RCRA Section 3004(u) and (v) requirements. An Interagency agreement under Section 120 of CERCLA does not serve as the replacement for a RCRA permit at a unit seeking an operating permit.

C. Importance of the State as a Party to the IAG

CERCLA Section 120(i) states that nothing in CERCLA Section 120 shall affect or impair the obligation of the Federal agency to comply with the requirements of RCRA, "including the corrective action requirements." One interpretation of CERCLA

Section 120(i) is that the provision allows "re-cleanup" of a release using RCRA corrective action authorities during or after a cleanup of that release under CERCLA; this could be a problem if a State, authorized to implement the RCRA program, contested the technical standards of an IAG. In order to avoid arguments over the interpretation of Section 120(i), as well as to avoid potentially duplicative exercises of authority, I encourage the inclusion of the State as a full signatory party for IAG's at RCRA facilities.

A three party agreement will ensure the following state roles in the agreement:

- O appropriate application of state clean-up standards
- O public participation requirements
- O enforceability
- O involvement in setting priorities
- O dispute resolution
- O review and comment on technical documents

This type of agreement would resolve differences between EPA and state requirements up front.

CONCLUSION

This memo is the first step in developing an integrated RCRA/CERCLA Federal facility compliance and cleanup strategy. The fundamental principle of the strategy is that there is no difference between environmental standards for Federal facilities and private facilities. EPA holds Federal facilities accountable for environmental cleanup and will proceed with enforcement actions at Federal facilities in the same way that we would proceed at private facilities. Although the limitations of enforcement authorities at Federal facilities have frustrated EPA's enforcement capabilities in the past, the RCRA corrective action requirements in combination with CERCLA authorities under Section 106 and Section 120 provide many options for achieving cleanup at Federal facilities.

I have recently established a Federal Facilities Compliance Task Force within OWPE which is dedicated to achieving compliance and cleanup at Federal facilities. The Task Force will be working closely with the CERCLA Enforcement Division and RCRA Enforcement Division of OWPE, other offices within Headquarters, and the Regions to develop guidance and policy regarding Federal facilities, to resolve difficult issues that arise from EPA's negotiations with Federal facilities, to track ongoing negotiations between EPA and Federal agencies, to pinpoint areas for potential enforcement response, and to relay the Agency's efforts at resolving compliance, corrective action and permitting issues at Federal facilities.

I am requesting that you forward any Federal Facility Compliance Agreements, Interagency Agreements, etc., that you are negotiating with Federal facilities in your Region to Gene A. Lucero, Director of the Office of Waste Programs Enforcement (Mail Code: WH-527).

As I mentioned earlier, the Task Force will be working with the Regions to pinpoint areas for possible enforcement action. As DOJ has encouraged EPA to take appropriate enforcement actions at GOCOs, the Task Force is interested in GOCO candidates for an enforcement action under RCRA or CERCLA. I am polling the Regions for suggestions of Federal facilities where the need for an enforcement action is imminent and there is a clear means of establishing the contractor as the operator. We will provide Headquarter's support for the development of the order and throughout the negotiation process.

If you have any questions regarding this memorandum or recommendations of candidates for potential enforcement actions, please contact Christopher Grundler, Director of the Federal Facilities Compliance Task Force at FTS 475-9801. Questions can also be directed to Jacqueline Thiell of the the Task Force at FTS 475-8727.

Attachments

cc:
Gene Lucero, OWPE
Roger Marzulla, DOJ
Henry Longest, OERR
Tom Adams, OECM
Marcia Williams, OSW
Frank Blake, OGC
Richard Sanderson, OFA
Hazardous Waste Management Division Directors, Regions I-X
Regional Counsels, Regions I-X
CERCLA Branch Chiefs, Regions I-X
RCRA Branch Chiefs, Regions I-X
Federal Facility Coordinators

ATTACHMENT I

Summary of the Department of Justice Testimony on Federal Facilities Before the House Oversight Committee, April 28, 1987

On April 28, 1987 the Subcommitte on Oversight and Investigations of the Committee on Energy and Commerce held a hearing on the implementation of the RCRA and CERCLA programs at Federal facilities. The primary issue that was discussed during the Congressional hearing was whether EPA could issue administrative orders to Federal facilities under RCRA (particularly §3008). DOJ has determined that EPA does not have the authority to issue an order under RCRA §3008(a) to a Federal facility. DOJ's argument, which is based on statutory and constitutional concerns, is as follows:

Within RCRA, compliance orders may be issued to persons under §3008(a). Congress did not define "person" to include the U.S. government or any instrumentality. Rather, it directed that Federal facilities:

> "Shall be subject to, and comply with, all Federal, State, interstate and local requirements, both substantive and procedural; (including any requirement for permits or reporting or any provisions for injunctive relief and such sanctions as may be imposed by a court to enforce such relief) respecting control and abatement of solid waste and hazardous waste disposal in the same manner, and to the same extent, as any person is subject to such requirements, ..." [§6001 Resource Conservation and Recovery Act]

Section 6001 is in effect the RCRA waiver of sovereign immunity. As prior case law establishes, such waivers are construed narrowly.

As to the use of §3008, DOJ reasoned that the issue hinged on whether §3008 orders are "requirements" of RCRA. DOJ concluded that §3008(a) orders are not requirements, rather they are a "means of enforcing requirements." Therefore, EPA cannot issue an order under the authority of §3008(a) against a Federal facility. Moreover, even if Congress were to correct this limitation by amending §6001 or the definition of "person", DOJ maintains that EPA cannot issue an order against another arm of the Executive Branch without the opportunity for

Presidential review before the order is final and effective. These "unilateral" orders violate the constitutional principle of unitary responsibility within the Executive Branch. Loosely translated, DOJ argued that the President must have the unfettered right to settle disputes within the Executive Branch. The problem with a §3008(a) order, DOJ says, is that since it is immediately enforceable in court under §7002, the citizen suit provision of RCRA, the President loses control of the Executive Branch.

DOJ does view §3008(h) orders for corrective action as involving permit requirements and therefore statutorily permissible. DOJ bases this determination on the specific parenthetical reference to permits in RCRA §6001 and concludes that corrective action in any form (e.g., §3004(u) and (v), §3008(h), §3013) is integral to the permitting process.

DOJ stated that EPA had the authority to issue administrative orders to other Federal agencies under CERCLA section 106 since the statutory term "facility" found in 42 U.S.C. 9609(a) is very broadly defined and encompasses Federal facilities. However, since all section 106 authority is vested in the President, the President's delegation as found in Executive Order 12580 requires the concurrence of the Attorney General when orders are being issued to other executive agencies. This same process applies to orders issued to Federal facilities under section 104(e)(5)(A) for the collection of information and to obtain access to Federal agency sites where needed.

On the topic of government-owned contractor-operated facilities, DOJ stated that they saw no constitutional or statutory problem to asserting §3008 authority (or any other authority) against the operator of these facilities. This means that EPA and the states have the ability to issue the full range of enforcement actions under RCRA and CERCLA at GOCOS.

ATTACHMENT 2

NOTICE OF NONCOMPLIANCE

FOR FEDERAL FACILITIES

This NOTICE OF NONCOMPLIANCE, COMPLIANCE SCHEDULE and NOTICE OF NECESSITY FOR CONFERENCE (Notice), is issued under the Resource Conservation and Recovery Act, (RCRA) and further amended by the Hazardous and Solid Waste Amendments. This Notice is issued consistent with Executive Order 12088, Federal Compliance With Pollution Control Standards. The authority to issue this Notice has been delegated by the Administrator of the U.S. Environmental Protection Agency to the Regional Administrator of EPA Region __ and further delegated to the Director, Waste Management Division, EPA Region __ (Complainant).

Complainant is issuing this Notice to the U.S. ____________ (Respondent) as a result of (an inspection on (date)/the review of relevant documents or other information/a referral for action from the State of ____________) which provides evidence that Respondent has violated or is in violation of one or more requirements of Subtitle C of RCRA and the regulations promulgated thereunder concerning the management of hazardous waste.

Pursuant to Section 6001 of RCRA, the Respondent as a (department/agency) of the executive branch of the Federal government and (generator of hazardous waste/owner or operator of a hazardous waste management facility) is subject to and must comply with both Federal and the State of __________'s requirements, including regulations and permit conditions pertaining to the management of hazardous waste in the same manner and to the same extent as any person (as defined in Section 1004(15) of RCRA) is subject to such requirements.

Section 7002 of RCRA provides for citizens suits against any person (including the United States) who is alleged to be in violation of any permit, standard, regulations, condition, requirements, prohibition or final order of RCRA. In addition, any person as defined in Section §1004(15) of RCRA, including any individual that may be responsible for the hazardous waste management activities at the facility, who has violated or is violating any requirement of Subtitle C of RCRA or who knowingly violates any material condition or requirement of a RCRA permit or interim status regulations or standards maybe subject to administrative, civil and/or criminal sanctions under Section 3008.

Reproduced from best available copy.

In order to return to compliance, Respondent must implement the actions prescribed in Section ____________ (Title of Section) of this Notice within the timeframes stipulated (subject of negotiation). Two possible alternatives to implementing the prescribed actions are (1) the seeking of a Presidental exemption pursuant to Section 6001 of RCRA or (2) the petitioning of Congress for specific legislative relief. [Note: Noncompliance with certain statutory or regulatory requirements of RCRA (e.g., Section 3005(e)(2)/40 C.F.R. 270.73(c) may require that the Respondent immediately cease the addition of hazardous waste to or the management of hazardous waste in the affected unit(s) or at the entire facility and that there is no action which the facility can take to return to compliance].

Within 15 days of the receipt of this Notice of Noncompliance/Violation, the Respondent must submit to EPA a written response describing the Respondent's efforts to comply with the violations outlined in this Notice. The Respondent must also identify a date for a settlement conference between the Respondent and the U.S. EPA. This response should be sent to ____________________ (identify person to receive response).

ATTACHMENT 3

MODEL ENFORCEABILITY CLAUSE FOR FEDERAL FACILITY COMPLIANCE AGREEMENTS

The [Department/Agency] recognizes its obligations to comply with RCRA as set forth in Section 6001 of RCRA.

The provisions of this Agreement including those related to statutory requirements, regulations, permits, closure plans, or corrective action, including recordkeeping, reporting and schedules of compliance, shall be enforceable under citizen suits pursuant to 42 U.S.C. 6972(a)(1)(A), including actions or suits by the State and its agencies. The [Department/Agency] agrees that the State and its agencies are a "person" within the meaning of Section 7002(a) of RCRA.

In the event of any action filed under Section 7002(a) of RCRA alleging any violation of any such requirement of this Agreement, it shall be presumed that the provisions of this Agreement including those provisions which address recordkeeping, reporting, and schedules of compliance are related to statutory requirements, regulations, permits, closure plans, or corrective action, and are thus enforceable under Section 7002(a) of RCRA.

ATTACHMENT 4

MODEL LANGUAGE FOR DISPUTE RESOLUTION

Except as specifically set forth elsewhere in this Agreement, if a dispute arises under this Agreement the procedures of this Part shall apply. In addition, during the pendency of any dispute, the [Department/Agency] agrees that it shall continue to implement those portions of this Agreement which are not in dispute and which U.S. EPA and [State] determine can be reasonably implemented pending final resolution of the issue(s) in dispute. If U.S. EPA and [State] determine that all or part of those portions of work which are affected by the dispute should stop during the pendency of the dispute, the [Department/Agency] shall discontinue implementing those portions of the work.

All Parties to this Agreement shall make reasonable efforts to informally resolve disputes at the Project Manager or immediate supervisor level. If resolution cannot be achieved informally, the procedures of this Part shall be implemented to resolve a dispute.

A. Within thirty (30) days of the date of any action by U.S. EPA or [State] which leads to or generates a dispute, the [Department/Agency] shall submit to U.S. EPA and [State] a written statement of dispute setting forth the nature of the dispute, the [Department/Agency's] position with respect to the dispute and the information the [Department/Agency] is relying upon to support its position. If the [Department/Agency] does not provide such written statement to U.S. EPA and [State] within this thirty (30) day period, the [Department/Agency] shall be deemed to have agreed with the action taken by U.S. EPA or [State] which led to or generated the dispute.

B. Where U.S. EPA or [State] issue a Written Notice of Position, any other Party which disagrees with the Written Notice of Position may provide the issuing Party with a written statement of dispute setting forth the nature of the dispute, its position with respect to the dispute and the information it is relying upon to support its position. If no other Party provides such a written statement of dispute within thirty (30) days of receipt of the Written Notice of Position, the Parties shall be deemed to have agreed with the Written Notice of Position.

C. Upon receipt of the written statement of dispute, the Parties shall engage in dispute resolution among the Project Managers and/or their immediate supervisors. The Parties shall have fourteen (14) days from the receipt by the U.S. EPA and [State] of the written statement of dispute to resolve the dispute. During this period the Project Managers shall meet as many times as are necessary to discuss and attempt resolution of the dispute. If agreement cannot be reached on any issue within this fourteen (14) day period any Party may, within ten (10) days of the conclusion of the fourteen (14) day dispute resolution period, submit a written notice to the Parties escalating the dispute to the Dispute Resolution Committee (DRC) for resolution. If no Party elevates the dispute to the DRC within this ten (10)

F. The U.S. EPA representative on the DRC is the Waste Management Division Director of U.S. EPA's Region ___. [State's] designated member is the [State's equivalent position]. The [Department/Agency's] designated member is the [Department/Agency's equivalent position]. Notice of any delegation of authority from a Party's designated representative on the DRC shall be provided to all other Parties pursuant to the procedures of Part XX.

G. The pendency of any dispute under this Part shall not affect the [Department/Agency's] responsibility for timely performance of the work required by this Agreement, except that the time period for completion of work affected by such dispute shall be extended for a period of time not to exceed the actual time taken to resolve any good faith dispute in accordance with the procedures specified herein. All elements of the work required by this Agreement which are not affected by the dispute shall continue and be completed in accordance with the applicable schedule. The determination of elements of work, Submittals or actions affected by the dispute shall be determined by U.S. EPA and shall not subject to dispute under this Part.

H. Within fourteen (14) days of resolution of a dispute pursuant to the procedures specified in this Part, the [Department/Agency] shall incorporate the resolution and final determination into the appropriate plan, schedule or procedures and proceed to implement this Agreement according to the amended plan, schedule or procedures.

I. Resolution of a dispute pursuant to this Part of the Agreement constitutes a final resolution of any dispute arising under this Agreement. The [Department/Agency] shall abide by all terms and conditions of any final resolution of dispute obtained pursuant to this Part of this Agreement.

ATTACHMENT 5

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JUN 24 1987

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Determination of Operator at Government-Owned Contractor-Operated (GOCO) Facilities

FROM: Gene A. Lucero, Director
Office of Waste Programs Enforcement

Marcia E. Williams, Director
Office of Solid Waste

TO: Waste Management Division Directors
Regions I - X

The purpose of this memorandum is to clarify who should sign as the operator on permit applications for Government-Owned Contractor-Operated (GOCO) facilities. Earlier guidance (see attached memo) had recommended that the Regional office consider the role of the contractor in the operation of the facility before determining who should sign the permit application. We also noted that in some cases where the contractor's role is less precisely defined the Region should exercise judgment given the factual situation.

It appears that there is still some confusion regarding signatories for permit applications. Whenever a contractor or contractors at a government-owned facility, are responsible or partially responsible for the operation, management or oversight of hazardous waste activities at the facility; they should sign the permit as the operator(s). In some instances both the Federal agency and the contractor(s) are the operators and multiple signatures to that effect would be appropriate. A review of the facility's operating records, contingency plans, personnel training records, and other documents relating to waste management should indicate who the operator(s) are. As a general rule, contractors will meet this test and therefore in most situations should be required to sign the permit application.

If you have any questions please contact Jim Michael, Office of Solid Waste at FTS 382-2231 or Anna Duncan, Office of Waste Programs Enforcement at FTS 382-4829.

Attachment

cc: Bruce Weddle, OSW
Elaine Stanley, OWPE
Chris Grundler, OSWER
Matt Hale, PSPD
Federal Facility Coordinators, Region I-X

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

MAR 24 1988

OFFICE OF
SOLID WASTE AND EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: Elevation Process for Achieving Federal Facility Compliance Under RCRA

FROM: J. Winston Porter, Assistant Administrator
Office of Solid Waste and Emergency Response

TO: Regional Administrators
Regions I-X

In my memorandum of January 25, 1988 I outlined the various enforcement mechanisms that EPA is able to use at Federal facilities under RCRA and CERCLA. The purpose of this memorandum is to set forth an elevation process for settling disputes between EPA and a Federal agency to assure that compliance agreements are settled in a timely fashion.

BACKGROUND

The Federal Facilities Compliance Task Force recently collected RCRA compliance information from the Regional offices in preparation for a Congressional Hearing before the Subcommittee on Transportation, Tourism, and Hazardous Materials. This information consistently showed that in cases where EPA had the enforcement lead at a Federal facility, negotiations between EPA and the Federal facility on the terms of a FFCA had been ongoing for extended periods of time. In some cases, negotiations between EPA and the Federal facility had exceeded the two year mark. Many Regions have expressed frustration in their apparent inability to compel the conclusion of these negotiations.

At the Hearing I expressed concern over the length of time it was taking to conclude settlement negotiations for compliance agreements at Federal facilities. I also described a process that the agency was developing for elevating disputes between EPA and Federal facilities to Headquarters for resolution. This elevation process for resolving disputes between EPA and a Federal facility when negotiations for a Federal Facility Compliance Agreement are not concluded in a timely fashion is described below. This process clearly would not apply if the initial enforcement action was taken against the contract-operator of a government-owned facility (GOCO).

NEGOTIATION AND ELEVATION PROCESS

As described in the January 25, 1988 memorandum, EPA will issue a Notice of Noncompliance (NON) to a Federal facility as the initial notification of RCRA class 1 violation(s) that are classified as high priority. The NON should be consistent with a RCRA 3008(a) complaint in format and content. The timeframes for the issuance of the NON should be in accordance with the RCRA Enforcement Response Policy for timely and appropriate enforcement actions.

The followup to a Notice of Noncompliance is the development of a Federal Facility Compliance Agreement (FFCA). The FFCA at a Federal facility is parallel to a final order at a private facility. It should contain a schedule of discrete actions for returning the facility to compliance. In addition to the provisions usually found in a final order under RCRA Section 3008(a), the FFCA must include an enforceability clause that is identical to the model language found in the January 25, 1988 memorandum and the model dispute resolution language for settling disputes within the context of implementing the compliance agreement.

After the issuance of a Notice of Noncompliance, the period for negotiating a Federal Facility Compliance Agreement should not exceed one hundred twenty (120) days. At day ninety (90), the Region should evaluate whether negotiations will be concluded within the next thirty days. If it appears that negotiations are close to settlement, the Region should aggressively pursue the finalization of the agreement within that thirty day period.

If it does not appear at day ninety (90) that negotiations for the FFCA will be completed within the following thirty days, the Region should refer the dispute to Headquarters for final resolution. The dispute should be formally referred to the Assistant Administrator for the Office of Solid Waste and Emergency Response within thirty (30) days of the expiration of the ninety day negotiation period. A notification of the elevation to Headquarters should also be sent to the Assistant Administrator for the Office of External Affairs and the Assistant Administrator for the Office of Enforcement and Compliance Monitoring. At the time of referral, the Region should consider issuing a press release on the compliance status of the facility.

When a dispute is elevated to Headquarters for resolution, the referral package should consist of a chronology which details the correspondence between the regional office and the Federal facility regarding the compliance status of the facility. The chronology should highlight the Region's efforts at reaching agreement with the facility. The referral package must also include a description of the specific issues in the FFCA that remain unresolved and the position of both the regional office and the Federal facility on these issues. Any background documents that substantiate the dispute(s) should also be included in the package.

My discussions and/or meetings with the equivalent representative from the Headquarter's office of the affected Federal agency to resolve the dispute shall take place for a period not to exceed thirty (30) days. Regional representatives may be asked to participate in these discussions. In any case, Headquarters will keep the Region apprised of the status of discussions. If the dispute is not resolved within the thirty (30) day period, the dispute will be elevated to the EPA Administrator and his Federal agency counterpart for resolution.

CONCLUSIONS

I would like to reiterate my request in the January 25, 1988 enforcement guidance to send copies of all Federal Facility Notices of Noncompliance and draft and final Federal Facility Compliance Agreements to the Federal Facility Compliance Task Force. The Task Force is reviewing the draft FFCAs to ensure that EPA's enforcement approach at Federal facilities is nationally consistent. Collection and review of this information will keep the Task Force up-to-date on Federal facility compliance issues. Copies of correspondence that indicate the lack of progress in negotiations between EPA and the Federal facility for an FFCA should also be forwarded to Headquarters. This information will allow the Task Force to anticipate the elevation of a case to Headquarters for resolution.

Let me close by noting that timely escalation of disputes is important to ensure compliance at Federal facilities. I urge you to apply these timeframes seriously and to communicate them to the Federal agency during the early stages of the negotiation of an FFCA. Federal facility compliance with the hazardous waste laws and regulations is one of my highest priorities. I would appreciate your full support in implementing this elevation process. If you or your staff have any questions, please contact Christopher Grundler, Director, Federal Facilities Compliance Task Force, Office of Waste Programs Enforcement, or Jacqueline Thiell of his staff.

cc: Hazardous Waste Management Division Directors, Regions I-X
Regional Counsels, Regions I-X

APPENDIX L

POLICY ON PUBLICIZING ENFORCEMENT ACTIONS

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

AUG - 4 1987

MEMORANDUM

SUBJECT: Addendum to GM-46: Policy on Publicizing Enforcement Activities

FROM: Thomas L. Adams, Jr. Thomas L. Adams
Assistant Administrator for Enforcement and Compliance Monitoring

Jennifer Joy Wilson Joy Wilson
Assistant Administrator for External Affairs

TO:
Assistant Administrators
General Counsel
Inspector General
Regional Administrators
Office of Public Affairs
(Headquarters and Regions I-X)
Regional Counsel (I-X)

I. ISSUE

Significant differences can exist between civil penalties proposed at the initiation of enforcement cases and the final penalties to be paid at the conclusion of such matters. This memorandum provides guidance on addressing the issue of the "penalty gap" where the difference between the proposed and final penalty is appreciable. EPA must avoid any public misperception that EPA is not serious about enforcement when such differences occur.

II. DISCUSSION

Attached is an "Addendum to the EPA Policy on Publicizing Enforcement Activities", GM-46, issued November 21, 1985. The Addendum provides standard text to be included in any press release announcing the settlement of an enforcement case in which the penalty amount finally assessed differs appreciably from the amount proposed.

Press releases issued at the filing of cases normally state the amount of the civil penalty being sought by the Agency. The proposed penalty may be the maximum statutory amount allowable under applicable law, or a penalty amount as calculated by application of an Agency penalty policy which assigns specific penalties to various violations of law.

When a case is settled, however, the penalty to be paid by the violator is oftentimes appreciably less than the penalty sought by the Agency at the initiation of the action. Members of the public may question any difference between these two amounts, especially persons who are not familiar with the laws, regulations, and published policies of the Agency.

The Addendum points out that a number of mitigating factors can result in a penalty adjustment, and that Congress on occasion has dictated that EPA take into account such factors in determining the amount of a civil penalty (e.g., TSCA §16, 15 U.S.C. 2615).

Attachment

ADDENDUM TO EPA POLICY ON PUBLICIZING ENFORCEMENT ACTIVITIES, GM-46, ISSUED NOVEMBER 21, 1985

I. PURPOSE

This addendum to the EPA Policy on Publicizing Enforcement Activities, GM-46, issued November 21, 1985, provides standard text which should be included in EPA press releases which announce the settlement of an enforcement case in which the final penalty is appreciably less than the proposed penalty.

The purpose of the text is to preclude any public misperception that EPA is not serious about enforcement when these appreciable differences occur.

II. BACKGROUND

Congress has directed the Agency in certain instances to consider specific mitigation factors in assessing a final penalty. Accordingly, the Agency regularly takes into account such factors as the gravity of the violation(s), the violator's compliance history, and its degree of culpability--in addition to weighing such litigation concerns as the clarity of the regulatory requirements and the strength of the government's evidentiary case--when negotiating a civil penalty amount as part of a settlement agreement. Guidance for applying mitigating adjustment factors is included in the Agency's published penalty policies.

III. POLICY

Since it is the policy of EPA to use publicity of enforcement activities as a key element in the Agency's program to promote compliance and deter violations, public awareness and accurate perceptions of the Agency's enforcement activities are extremely important.

Appreciable differences between civil penalty amounts proposed at the commencement of enforcement cases and the final penalty sums to be paid at the conclusion of such matters may be erroneously perceived as evidence that EPA is not serious about enforcing the Nation's environmental laws. Consequently, such differences should be explained and accounted for in the Agency's communications to the public.

It is the policy of EPA that when press releases are issued to announce the settlement of enforcement cases in which the settlement penalty figure is appreciably less than the initially proposed penalty amount, such releases should include standard text (see Section IV, p.2) to ensure that the general public is adequately informed of the analysis behind the final penalty amount, and the reasons justifying the penalty reduction. The release should also describe any environmentally beneficial performance required under the terms of the settlement which goes beyond actions being taken simply to come into compliance.

IV. IMPLEMENTATION OF POLICY

When a press release is issued at the settlement of an enforcement action, any such press release that includes the announcement of a final penalty assessment which is appreciably different from the penalty proposed at the outset of the case should include the following standard text:

> "The civil penalty in this action was the product of negotiation after careful consideration by the government of the facts constituting the violation, the gravity of the misconduct, the strength of the government's case, and established EPA penalty policies.
>
> [NOTE: Include the following paragraph only in cases involving environmentally beneficial performance.]
>
> "In agreeing to this $___________ penalty, the government recognizes the contribution to long-term environmental protection of [briefly summarize here the environmentally beneficial performance explained in detail in the body of the release]."

GM-46

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 21 1985

MEMORANDUM

SUBJECT: Policy on Publicizing Enforcement Activities

FROM: Courtney M. Price Courtney M. Price
Assistant Administrator for Enforcement
and Compliance Monitoring

Jennifer Joy Manson Jennifer Joy Manson
Assistant Administrator for External Affairs

TO: Assistant Administrators
General Counsel
Inspector General
Regional Administrators
Office of Public Affairs
(Headquarters and Regions I-X)
Regional Counsel (I-X)

Attached is the EPA Policy on Publicizing Enforcement Activities, a joint project of the Office of Enforcement and Compliance Monitoring and the Office of Public Affairs. The document establishes EPA policy on informing the public about Agency enforcement activities. The goal of the policy is to improve communication with the public and the regulated community regarding the Agency's enforcement program, and to encourage compliance with environmental laws through consistent public outreach among headquarters and regional offices.

To implement this policy, national program managers and public affairs directors should review the policy for the purpose of preparing program-specific procedures where appropriate. Further, program managers should consider reviewing the implementation of this policy in EPA Regional Offices during their regional program reviews. These follow-up measures should ensure that publicity of enforcement activities will constitute a key element of the Agency's program to deter environmental noncompliance.

Attachment

EPA POLICY ON PUBLICIZING ENFORCEMENT ACTIVITIES

I. PURPOSE

This memorandum establishes EPA policy on informing the public about Agency enforcement activities. This policy is intended to improve EPA communication with the public and the regulated community regarding the goals and activities of the Agency's enforcement program. Appropriate publication of EPA enforcement efforts will both encourage compliance and serve as a deterrent to noncompliance. The policy provides for consistent public outreach among headquarters and regional offices.

II. STATEMENT OF POLICY

It is the policy of EPA to use the publicity of enforcement activities as a key element of the Agency's program to deter noncompliance with environmental laws and regulations. Publicizing Agency enforcement activities on an active and timely basis informs both the public and the regulated community about EPA's efforts to promote compliance.

Press releases should be issued for judicial and administrative enforcement actions, including settlements and successful rulings, and other significant enforcement program activities. Further, the Agency should consider employing a range of methods of publicity such as press conferences and informal press briefings, articles, prepared statements, interviews and appearances at seminars by knowledgeable and authorized representatives of the Agency to inform the public of these activities. EPA will work closely with the states in developing publicity on joint enforcement activities and in supporting state enforcement efforts.

III. IMPLEMENTATION OF POLICY

A. When to Use Press Releases 1/

1. Individual Cases

It is EPA policy to issue press releases when the Agency: (1) files a judicial action or issues a major administrative order or complaint (including a notice of proposed contractor listing and the administrative decision to list); (2) enters into a major judicial or administrative consent decree or files a motion to enforce such a decree; or (3) receives a successful court ruling. In determining whether to issue a press release,

---

1/ The term "press release" includes the traditional Agency press release, press advisories, notes to correspondents and press statements. The decision on what method should be used in a given situation must be coordinated with the appropriate public affairs office(s).

EPA personnel will consider: (1) the amount of the proposed or assessed penalty (e.g., greater than $25,000); (2) the significance of the relief sought or required in the case, and its public health or environmental impact; (3) whether the case would create national or program precedence; and (4) whether unique relief is sought. However, even enforcement actions that do not meet these criteria may be appropriate for local publicity in the area where the violative conduct occurred. Where appropriate, a single press release may be issued which covers a group or category of similar violations.

Where possible, press releases should mention the environmental result desired or achieved by EPA's action. For example, where EPA determines that a particular enforcement action resulted (or will result) in an improvement in a stream's water quality, the press release should note such results. In addition, press releases must include the penalty agreed to in settlement or ordered by a court.

Press releases can also be used to build better relationships with the states, the regulated community, and environmental groups. To this end, EPA should acknowledge efforts by outside groups to foster compliance. For example, where a group supports EPA enforcement efforts by helping to expedite the cleanup of a Superfund site, EPA may express its support for such initiatives by issuing a press release, issuing a statement jointly with the group, or conducting a joint press conference.

2. Major Policies

In addition to publicizing individual enforcement cases, EPA should publicize major enforcement policy statements and other enforcement program activities since knowledge of Agency policies by the regulated community can deter future violations. Such publicity may include the use of articles and other prepared statements on enforcement subjects of current interest.

3. Program Performance

Headquarters and regional offices should consider issuing quarterly and annual reports on Agency enforcement efforts. Such summaries present an overview of the Agency's and Regions' enforcement activities; they will allow the public to view EPA's enforcement program over time, and thus give perspective to our overall enforcement efforts. The summaries should cover trends and developments in Agency enforcement activities, and may include lists of enforcement actions filed under each statute. The Office of Enforcement and Compliance Monitoring's (OECM) Office of Compliance Analysis and Program Operations, and the Offices of Regional Counsel will assist the Public Affairs Offices in this data gathering. Public Affairs Offices can also rely on the figures contained in the Strategic Planning Management System.

4. Press Releases and Settlement Agreements

EPA has, on occasion, agreed not to issue a press release as part of a settlement agreement. EPA should no longer agree to a settlement which bars a press release or which restricts the content of a press release. On January 30, 1985, the Deputy Administrator issued an abbreviated press release policy, which stated in pertinent part that: "It is against EPA policy to negotiate the agency's option to issue press releases, or the substance of press releases, with parties outside of EPA, particularly those parties involved in settlements, consent decrees or the regulatory process." This policy will help to ensure consistency in the preparation of press releases and equitable treatment of alleged violators.

B. Approval of Press Releases

EPA must ensure that press releases and other publicity receive high priority in all reviewing offices. By memorandum dated August 23, 1984, the Office of External Affairs directed program offices to review and comment on all press releases within two days after the Office of Public Affairs submits its draft to the program office; otherwise concurrence is assumed. This review policy extends to OECM and the Offices of Regional Counsel for enforcement-related press releases.

C. Coordination

1. Enforcement, Program, and Public Affairs Offices

More active use of publicity requires improved coordination among regional and headquarters enforcement attorneys, program offices and public affairs offices. The lead office in an enforcement case, generally the regional program office in an administrative action and the Office of Regional Counsel or OECM in a judicial action, should notify the appropriate Public Affairs Office at the earliest possible time to discuss overall strategy for communicating the Agency's action (e.g., prior notice to state or local officials) and the the timing of a press release. The lead office should stay in close contact with Public Affairs as the matter approaches fruition.

2. Regional and Headquarters Offices of Public Affairs

Regional and headquarters Public Affairs Offices should coordinate in developing press releases both for regionally-based actions that have national implications and for nationally managed or coordinated enforcement actions. Whenever possible, both regional and headquarters offices should send copies of draft press releases to their counterparts for review and comment. Both such offices should also send copies of final releases to their counterparts.

3. EPA and DOJ

EPA can further improve the timeliness and effectiveness of its press releases regarding judicial actions by coordinating with DOJ's Office of Public Affairs. When an EPA Office of Public Affairs decides that a press release in a judicial enforcement case is appropriate, it should notify DOJ or the appropriate U.S. Attorney's Office to ensure timeliness and consistency in preparation of press releases. DOJ has been requested to notify OECM when DOJ intends to issue a release on an EPA-related case. EPA's Office of Public Affairs will immediately review such draft releases, and, if necessary to present the Agency's position or additional information, will prepare an Agency release.

4. EPA and the States

Another important goal of this policy is to encourage cooperative enforcement publicity initiatives with the states. The June 26, 1984, "EPA Policy on Implementing the State/Federal Partnership in Enforcement: State/Federal Enforcement 'Agreements,'" describes key subjects that EPA should discuss with the states in forming state-EPA Enforcement Agreements. The section on "Press Releases and Public Information," states that the "Region and State should discuss opportunities for joint press releases on enforcement actions and public accounting of both State and Federal accomplishments in compliance and enforcement." Further, as discussed in the subsequent January 4, 1985, Agency guidance on "Implementing Nationally Managed or Coordinated Enforcement Actions," the timing of state and EPA releases "should be coordinated so that they are released simultaneously."

Accordingly, EPA Public Affairs Offices should consult with the relevant state agency on an EPA press release or other media event which affects the State. EPA could offer the State the option of joining in a press release or a press conference where the State has been involved in the underlying enforcement action. Further, EPA-generated press releases and public information reports should acknowledge and give credit to relevant state actions and accomplishments when appropriate.

Finally, it is requested that EPA Public Affairs Offices send the State a copy of the EPA press release on any enforcement activity arising in that state.

D. Distribution of Press Releases

The distribution of EPA press releases is as important as their timeliness. Press releases may be distributed to the local, national, and trade press, and local and network television stations.

1. Local and National Media

EPA must "direct" its press releases to ensure that the appropriate geographical areas learn about EPA enforcement activities. To accomplish this goal, the appropriate Public Affairs Office should send a press release to the media and interest groups in the affected area, i.e., the local newspaper and other local publications, television and radio stations, and citizen groups. The headquarters Public Affairs Office, in conjunction with the appropriate regional office, will issue press releases to the national press and major television networks where an EPA enforcement activity has national implications.

2. Targeted Trade Press and Mailing Lists

The Agency must also disseminate information about enforcement activities to affected industries. Sending a press release to relevant trade publications and newsletters, particularly for a significant case, will put other potential violators on notice that EPA is enforcing against specific conduct in the industry. It is also useful to follow up such press releases with speeches to industry groups and articles in relevant trade publications, reinforcing the Agency's commitment to compliance.

To ensure the appropriate distribution of publicity, we are requesting each of the regional Public Affairs Offices, in cooperation with the Regional Counsels and regional program offices, to establish or review and update their mailing lists of print media, radio and television stations, state and local officials, trade publications, and business and industry groups for each of the enforcement programs conducted in the Regions.

E. Use of Publicity Other Than Press Releases

EPA headquarters and regional offices have generally relied on press releases to disseminate information on enforcement activities. Other types of enforcement publicity are also appropriate in certain instances.

1. Press Conferences and Informal Press Briefings

Press conferences can be a useful device for highlighting an enforcement activity and responding to public concerns in a specific area. Regional Administrators should consider using press conferences to announce major enforcement actions and to elaborate on important simultaneously issued press releases. Press conferences should also be considered where an existing or potential public hazard is involved. The regional Public Affairs Office should always inform the headquarters Public Affairs

Office when it decides to hold a press conference to provide an opportunity for the Administrator's advance knowledge and involvement if necessary.

2. Informal Meetings with Constituent Groups

To further supplement EPA efforts to inform the public and regulated community, regional offices should meet often with constituent groups (states, environmental groups, industry, and the press) to brief these groups on recent enforcement developments. These meetings can be organized by the Public Affairs Offices. By informing the public, EPA increases public interest in its enforcement program and thereby encourages compliance.

3. Responding to Inaccurate Statements

EPA should selectively respond to incorrect statements made about EPA enforcement activities. For example, EPA may want to respond to an editorial or other article which inaccurately characterizes EPA enforcement at a Superfund site with a "letter to the editor." Where an agency response is deemed to be appropriate, it should promptly follow the inaccurate statement.

4. Articles and Prepared Statements

EPA's Public Affairs Offices and the Office of Enforcement and Compliance Monitoring occasionally prepare articles on various aspects of the Agency's enforcement program. For example, Region I issues a biweekly column to several newspapers in the Region covering timely enforcement issues such as asbestos in schools. We encourage all regional and headquarters offices to prepare feature articles on enforcement issues. When the regional office is developing an article on a subject with national implications, it should contact the headquarters Office of Public Affairs to obtain a possible quote from the Administrator and to discuss whether the article should be expanded to a national perspective. Likewise, appropriate regions should be consulted in the preparation of headquarters articles or statements which refer to actions of or facilities in particular regions.

5. Interviews

In some cases, headquarters and regional Public Affairs Offices should consider arranging media interviews with the Regional Administrator, Deputy Administrator, the Administrator, or other EPA officials. Such an interview will reflect the Agency's position on a particular enforcement activity or explain EPA's response to an enforcement problem.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989-- 2 3 2 - 6 1 2 0 0 1 2 3